(1) Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

WILLIAM H.JOHNSON, and
LINDA L.JOHNSON,
Petitioners,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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94pp

QUESTIONS PRESENTED FOR REVIEW

.1. Whether the Internal Revenue Service can legally mail a 2nd statutory notice of deficiency to petitioners for tax years 1981, 1982 and 1983, during an ongoing collection action for petitioners' 1981, 1982 and 1983, tax years, over 6 years after the 1st statutory notices of deficiency for petitioners' 1981, 1982 and 1983, tax years were deliberately mailed to an invalid address.

.2. Whether the Internal Revenue Service employees conspired to deprive petitioners of their property without due process of law by mailing statutory notices of deficiency dated Sept. 3, 1987, to an address where petitioners would not receive them.

.3. Whether the Internal Revenue Service employees conspired to fraudulently conceal material facts relevant to the examination of petitioners' 1981, 1982 and 1983, federal tax years.

.4. Whether the Internal Revenue Service employees conspired to deprive petitioners of their property by mailing them a 2nd statutory notice of deficiency dated Dec. 2, 1993, for tax years 1981, 1982 and 1983.

.5. Whether the Government's Trial Attorney, Ann Carroll Reid, joined the conspiracy to fraudulently conceal material facts relevant to petitioners' district court discovery requests.

.6. Whether petitioners were deprived of their Constitutional Fifth Amendment right to a meaningful hearing within the Internal Revenue Service and by the district court relevant to their 1981, 1982 and 1983 tax years and civil action. cont'd.

.7. Whether the district court erred in its decision relevant to petitioners' 26 U.S.C. Section 7422 cause of action for refunds of tax overpayments and statutory interest for 1988, 1989 and 1990, and to petitioners' motion for summary judgment pursuant to their 26 U.S.C. Section 7422 cause of action.

.8. Whether the district court erred in its decision relevant to petitioners' 26 U.S.C. Section 7433 cause of action for damages for unauthorized collection actions.

.9. Whether the district court erred in its decision relevant to petitioners' 5 U.S.C. Section 552(a)(4)(B) cause of action for judicial review of Internal Revenue Service withholding of records.

.10. Whether the district court's wide discretion as a factfinder includes the addition of the deliberative process privilege claim in its order dated March 29, 1999, which the Respondent **did not claim** and which could only have applied to the document "District Counsel's Response."

.11. Whether the district court abused its discretion by granting the Respondent's motion for summary judgment before petitioners' discovery was completed.

.12. Whether the district court abused its discretion by not disqualifying itself pursuant to 28 U.S.C. Section 455(a).

.13. Whether the Court of Appeals applied the proper standards in evaluating the district court's decision to grant Respondent's motion for summary judgment on all counts. cont'd.

.14. Whether the Court of Appeals erred when it did not reverse the district court's judgment and order new trial before a different judge.

.15. Whether the Court of Appeals erred in denying petitioners' motion for appointment of a Special Master to hold hearings relevant to the Internal Revenue Service disclosure office misconduct and Respondent's Trial Attorney's misconduct.

PARTIES TO THE PROCEEDINGS

Petitioners William H. Johnson and Linda L. Johnson were also the petitioners in the Court of Appeals, and Respondent United States of America was the responden. below.

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PETITION FOR A WRIT OF CERTIORARI

William H. Johnson and Linda L. Johnson, appearing *pro se* , respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the eleventh Circuit in this case.

OPINIONS BELOW

The district court's decision granting Respondent's motion for summary judgment on all counts, App. 4-26, *infra*, is unpublished. The district court's judgment, dismissing Petitioners' action, App. 27, *infra*, is unpublished. The district court's order denying Petitioners' motions for reconsideration, stay of judgment pending appeal and for judicial disqualification, App. 28-31, *infra*, is unpublished. The district court's order denying Petitioners' motion for reconsideration, re: judicial disqualification, App. 32-34, *infra*, is unpublished. The court of appeals' order denying their petition for rehearing, and petition for rehearing *en banc*, App. 35-37, *infra*, is unpublished. The court of appeals' judgment, App. 38-39, *infra*, is unpublished.

JURISDICTION

The opinion of the court of appeals was filed on April 24, 2000. App. 1-3, *infra*. A petition for rehearing and rehearing *en banc* was denied on July 7, 2000. App.35, *infra*. This Court has jurisdiction to review the court of appeals' opinion pursuant to 28 U.S.C. section 2101(c).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Constitution of the United States, Amendment 5, App. 63; 5 U.S.C. sections 301,App.63, 552(a)(4)(B), App. 64; 18 U.S.C. sections 241, App. 64, 2071, App. 65; 26 U.S.C. sections 6212, App.65-66, 6213, App. 66, 6501, App.66, 7422, App. 67, 7433, App. 67-68; 28 Chapter I- Part-50- Statement of Policy, Order No. 530-73, App. 68-69; 28 U.S.C. sections 144, App. 70, 455, 455(a), 1346(a)(1), App. 70-71; 26 C.F.R. sections 301.7433-1, 601.105, App. 71-72, 601.106(f)(1), App. 72, 601.702, 601.702(c)(8), App. 73-74; Internal Revenue Manual (IRM) sections 1(15)59.26, App. 75 3(15)(185)0, 3(15)(185)(12).1, App. 75-76, 3(15)(185)(13).4, App. 76-77, 4243.2, App. 77; Disclosure of Official Information Handbook, section (13)34, App.78; Document 6209, App. 78-79.

STATEMENT

Internal Revenue Service Project 21, as it was applied to petitioners William H. Johnson and Linda L. Johnson for their federal tax years 1981, 1982 and 1983, was a willful and malicious conspiracy to deprive petitioners of their Constitutional Fifth Amendment due process rights of timely statutory notice and meaningful hearing , before seizing their property, in violation of 18 U.S.C. section 241 and numerous other statutes and regulations.

REASONS FOR GRANTING THE PETITION

William H. Johnson and Linda L. Johnson, petitioners herein, express a belief that the United States Court of Appeals for the Eleventh Circuit has entered a decision in conflict with its own decisions and decisions in other United States courts of appeal on the same important matters and has decided important federal questions in a way that conflicts with relevant decisions of this Court.

.1. On or about Feb. 22, 1988, Respondent assessed an alleged federal tax liability against petitioners for federal tax years 1981, 1982 and 1983. In late 1988, a collection action for petitioners' federal tax years 1981, 1982 and 1983 was started in Georgia with the filing of federal tax liens, all of which remained in continuous force until July 29, 1994, when one of these liens was released. Two of these liens remained unreleased until May 12, 1995. Sometime before March 24, 1993, IRS District Counsel concluded that the notices were of questionable validity and "therefore, it would be best not to rely on the original statutory notices of deficiency." They also agree with me that new deficiency notices can be mailed to the taxpayers. (See copy of District Counsel's response in case file.) Appeals Settlement Memorandum, App. 41-49, at App. 47. "The IRS can issue multiple notices as long as the taxpayer has not petitioned the Tax Court and the statute is still open. *Lewis E. Smoot v. Commissioner,* 25 BTA 1038 (1932)." "The only problem that I see is that the Philadelphia District examination files cannot be located. App. 48

On March 23, 1993, Revenue Officer, Janet Grimes received a telephone call from Appeals Officer Patricia E. Hoyt which states, in part, "Tax amount is

incorrect, in addition to examination issuance of statutory notice to wrong address when had a correct address for Tp, Tp never received notice." App. 50
Petitioners, in Plaintiffs' Answers to Mandatory Interrogatories, filed on July 11, 1996, in district court, (1) reference to RA Butler's knowledge of petitioners' more recent address, (2) reference to Hoyt's partiality in petitioners' appeals conference, (3) reference to C.F.R. section 601.106(f)(1) Rule I relevant to "strict impartiality" between the government and the taxpayer by the Appeals Division, (4) reference to Fifth Amendment Rights, (5) reference to *Smoot,* (6) reference to 2nd notice of deficiency, (7) reference to Attachment 1, 19-26, which was a copy of the Appeals Settlement Memorandum, which was filed in district court on July 11, 1996, with petitioners' complaint. Petitioners, in their opposition to Respondent's motion for summary judgment, (Doc 39), under the "Discussion" raise the issues of the legality of the Feb. 22, 1988, assessments and why a 2nd notice of deficiency was issued. Petitioners also draw the district court's attention to the following subjects, (1) Due Process of Law, (2) Procedural Due Process, (3) Notice, (4) Fair Hearing, (5) 26 U.S.C. section 6212, (6) Last Known Address, (7) Reasonable Care & Diligence, (8) Internal Revenue Manual, (9) Proper Notice. Much of the above information and facts were included in petitioners' "Statement of Material Facts in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment." (Doc 39)

A review of *Smoot,* at 1041, OPINION, Goodrich: "We have previously held that where no petition is filed with this Board appealing from a deficiency notice issued by the Commissioner in accordance with section 274 of the Revenue Act of 1926, a second deficiency notice for the same taxable period may be issued." The qualifier here, is the first notice issued by

the Commissioner, **be in accordance with Section 274 Of the Revenue Act of 1926.** (emphasis added)

Petitioners argue that their first notices of deficiency **were not** issued by the Commissioner in accordance with the provisions of the Internal Revenue Code of 1986 (26 U.S.C.) and that the reliance on *Smoot* , by District Counsel and Appeals relevant to the issuance of the 2nd notice of deficiency to petitioners was improper. Appeals and District Counsel had all necessary facts relevant to the issuance of the 1st notices to an invalid address and had concluded that the notices were of questionable validity and thus the Feb. 22, 1988, assessments were legally unenforceable. Federal tax liens were not released and alleged taxes were not abated.

It is well settled that whatever may be uncertain about the definition of the term "Due Process of Law," all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing. Authorities: *Garfield v. U.S.*, 211 U.S. 249; *Brandt v. Hickel*, 427 F.2d 53; *Mathews v. Eldridge*, 424 U.S. 319; *Bolling v. Sharpe*, 347 U.S. 497; *Dent v. West Virginia*, 129 U.S. 114; App. 80-82, Constitution of the United States of America, Amendment 5. App. 63.

.2. Evidence shows that RA Butler began working on petitioners' audit for 1981, 1982 and 1983 on or about May 1, 1986, and that he finished the audit on or about May 19, 1986. Evidence also shows that Butler knew petitioners no longer lived at their old address on May 7, 1986, and that he knew petitioners' new address on May 7, 1986. Appeals Officer investigated the validity of petitioners' Sept. 3, 1987, notices of deficiency and informed RO Grimes, "she is returning case to Examination Division to be reworked

tax amount is incorrect, in addition to examination issuance of Statutory Notice to wrong address when had a correct address for Tp." Hoyt states in Appeals Settlement Memorandum, **App. 46,** "Even when the notices were returned undelivered, the second notices were mailed to the same address. I confirmed with the Philadelphia 90-day letter unit that no notices were issued to other addresses. There is no evidence that any research was conducted to determine a more recent address before the notices were issued." The IRS employees involved with the issuance of the Sept. 3, 1987, notices of deficiency were, Carl J. Butler, Laura Tarboro, J. Jackson and R. Jackson. Butler could not issue the notices alone. The Commissioner violated numerous statutes and regulations; IRM 3(15)(185)0; IRM 4243.2; 26 U.S.C. sections 6212, 6213; petitioners' Fifth Amendment rights to due process and equal protection and 18 section 241, Conspiracy against rights, etc. **App. 63-79** Most of this information was presented to the district court in petitioners' complaint, (Doc 1), Answers (Doc 2), (Doc 5), (Doc 39) and petitioners' Attachments no.1. and no. 12. Petitioners argue that they would have no cause for this civil action for damages against Respondent without the above conspiracy, that failure to mail statutory notices of deficiency to petitioners' last known address rendered the Feb. 22, 1988, assessments legally unenforceable and **was the foundation of an unauthorized collection action pursuant to 26 U.S.C. section 7433.** Authorities: *U.S. v. Price,* 383 U.S. 787; *U.S. v. McDermott,* 918 F.2d 319; *U.S. v. Guest,* 383 U.S. 745; *Walker v. U.S.,* 93 F.2d 383. **App. 82-83**

.3. On Jan. 12, 1991, petitioners mailed a joint FOIA request to Atlanta IRS disclosure for records relevant to 1981-1986, and mentioned RA Carl Butler and D. White, in Lancaster, PA. This request was

assigned to assigned to disclosure specialist M. McGovern who contacted Wm. Connelly in Phila. But did not transfer petitioners' request. McGovern was also in contact with Appeals Officer Hoyt who advised Mcgovern, "the files in PA are really the ones he wants & he probably should receive reconsideration." Petitioners were informed by letter dated Jan. 28, 1991, that, "only the tax years 1984 & 1986 are under our jurisdiction." See **App. 73,** (c)(2)(i) and **App. 78,** Making Transfers Petitioners argue that IRS disclosure office employees joined the conspiracy to deprive petitioners of their property without due process by the **fraudulent concealment of material facts** relevant to the examination of petitioners' 1981, 1982 and 1983 federal tax years prior to the entry of the U.S. Tax Court decision entered July 12, 1994. See authorities at no. 2. above.

.4. Appeals and District Counsel concluded that the Sept. 3, 1987, notices of deficiency were of questionable validity. App. 47 Hoyt states, "the only problem that I see is that the Phila. District examination files cannot be located." App. 48 Hoyt recommended that this case be returned to the Atlanta District Examination Division for reissuance of the notices if the exam workpapers can be found and suggests, that if they cannot be found, for reconsideration of petitioners' Offer in Compromise. "In any event the taxpayer's correct tax figures would not be less than the amounts of tax shown on the "returns" filed by the taxpayers on Dec.4, 1990." App. 49 The Phila. Exam workpapers were not located and petitioners declined reconsideration of their returns filed on Nov. 27, 1990. Petitioners' Offer in Compromise was not accepted, "manager advised the reviewer (Monica) to issue a 2nd Notice of Deficiency (with figures different from the original notice)." "this approach is consistent with Counsel advice." **App. 56**

This evidence was included in petitioners' Attachment no. 1., filed in district court with their complaint on July 11, 1996. Petitioners argue that Hoyt, Sheffield, Jones, Runyan, Dawson, Gilliam and Word joined the conspiracy to deprive petitioners of their property by illegally issuing a 2nd notice of deficiency dated Dec. 2, 1993, for petitioners 1981, 1982 and 1983, federal tax years. Authorities at no. 2. Above.

.5. Petitioners' 1st district court discovery request dated Jan. 20, 1998, was for all documents and material relevant to IRS Project 21. Respondent's Trial Attorney, Ann Carroll Reid, claimed that no such documents exist. That there are no relevant documents to be produced. **App. 62** Petitioners provided the district court with evidence that information relevant to Project 021 did in fact exist. **App.60-61** On or about Nov. 29, 1999, petitioners received from Washington, D.C. IRS disclosure, a copy of Document 6209 for 1987, approximately 390 pages which contained information relevant to decoding the computer transcripts and lead petitioners to IRM 3(15)(185)0, Substitute for Returns (SFR) Program. On June, 9, 2000, petitioners received a response to their FOIA request which included; IRM 4243.2, Undelivered Mail, **App. 77;** section (13)34, Making Transfers, **App. 78;** and section 3(15)(185)0 which included section 3(15)(185)(12).1, Notice Issuance Criteria, from which **a very important line is redacted, App. 75-76** and section 3(15)(185)(13).4, Undelivered Statutory Notices, **App. 76-77.** Petitioners first raised the issue of Reid's misconduct in their motion (Doc 25) for the extension of time for discovery, together with their Attachment no. 9. And requested a discovery hearing. Petitioners outlined additional examples of misconduct by Reid in their opposition (Doc 35) to Respondent's motion for sanctions, together with their Attachment no. 11. Petitioners

argue that Reid and IRS Attorney Clinton Freid joined the conspiracy to deprive petitioners of their property without due process by the **fraudulent concealment of material facts** relevant to petitioners discovery requests. See authorities at no.2. above.

.6. On Dec. 4, 1990, Revenue Officer Bridges issued 3 requests fir adjustments for tax years 1981, 1982 and 1983, on the grounds, "Tp never rec'd statutory notification." Response, "Claim rejected. 916C-N- pay tax first. Per auditor L. Messick." "Disallow 81, 82 & 83 Claims- prior audit, tax not paid on claim t/p has changed figures from prior examination with no explanation or backup info advise t/p to pay tax the file Claim to Reopen audit." Petitioners received no meaningful hearing from RA Word on Jan. 28, 1992, nor from Hoyt on July 9, 1992. Petitioners requested a second conference with Hoyt, without response. Petitioners requested a discovery conference in (Doc 25) relevant to Reid's misconduct, which was ignored by the district court and petitioners received no evidentiary hearing by the district court prior to its granting of Respondent's summary judgment motion on all counts. Petitioners argue that they were deprived of their Fifth Amendment right to a meaningful hearing within the IRS and by the district court relevant to their 1981, 1982 and 1983 tax years and civil action. Authorities: *Ochoa v. Hernandez Y Morales*, 230 U.S. 139; *Garfield v. U.S.*, 211 U.S. 249; Mathews v.*Eldridge*, 424 U.S. 319, **App. 80-81;** *Armstrong v. Manzo*, 380 U.S. 545, **App. 86.**

.7. The statutory notice of deficiency dated Dec. 2, 1993, was for tax years 1981, 1982 and 1983, **only** The U.S. Tax Court decision dated July 12, 1994, was decided by stipulated agreement of the parties and was based only on the fact that the statutory notice of deficiency was issued **OUT OF TIME** pursuant to 26

26 U.S.C. section 6501. **App.66** **No issues were litigated before the Tax Court by the parties.** Petitioners complaint (Doc 1) causes no.5. to no. 18. Is for tax overpayments and statutory interest for tax years **1988, 1989 and 1990, only.** The Appeals Division would not support a second statutory notice of deficiency without the Phila. Examination workpapers. These workpapers were never located, however, a 2nd notice of deficiency was issued to petitioners regardless. Petitioners argue that the district court erred in granting Respondent's summary judgment motion as to petitioners' 26 U.S.C. section 7422, claims for refunds of tax overpayments and statutory interest for their tax years 1988, 1989 and 1990, on the basis of *res judicata*. Petitioners also argue that they were deprived of their right to a trial by jury on this issue. Authorities: *Commissioner v. Sunnen*, 333 U.S. 591; *U.S. v. Internalnational Building Co.*, 345 U.S. 502; *Cromwell v. County of Sac*, 94 U.S. 351. **App. 93-96**

.8. Petitioners' complaint filed July 11, 1996, (Doc 1) & (Doc 2), included 1st cause, damage action for unauthorized collection action pursuant to U.S.C. section 7433. The district court, in its order dated Mar. 29, 1999, **App. 23,** states, "Given the extensive litigation and discovery that had been conducted between Plaintiffs and the IRS prior to June 12, 1994, (July 12, 1994), the court finds that Plaintiffs had a reasonable opportunity to discover the elements of their section 7433 action." As stated at no. 7. Above, no issues were litigated in U.S. Tax Court. The "Record of Audit Activity and AIMS Update" was removed from William Johnson's 1981, 1982 and 1983 examination file before disclosure on May 6, 1992, and Linda Johnson's 1981, 1982 and 1983 examination file was not located. **App. 57-58.** No records were made available for petitioners inspection during Tax Court

discovery. Petitioners were not aware that 3 additional notices of federal tax lien were filed until April 18, 1995. Petitioners did not obtain the following documents until after July 13, 1994: (1) the Tax Court decision, (2) the Appeals Transmittal and Case Memo, **App. 40,** (3) the Appeals Settlement Memorandum, **App. 41-49,** (4) RO Janet Grimes, Investigation History dated 3-23-93, **App. 50,** (5) Reviewers Report, **App. 50-52,** Response to Reviewer's Report, **App. 53,** (6) Addendum to 4318, **App.54,** (7) Handwritten note: dated 11/3/93, **App. 54-55,** (8) IRS Memorandum dated Nov. 17, 1993, **App. 55-56,** and (9) District Counsel's Response was withheld from petitioners by the district court. Petitioners argue that the district court erred in granting Respondent's motion for summary judgment as to petitioners' 26 U.S.C. section 7433 claim for damages for unauthorized collection action. Petitioners argue that their right to action could not have accrued before July 14, 1994, the date they received the Tax Court decision which was an essential element of a cause of action. Petitioners argue that their right to action accrued as late as May 15, 1995, the date the IRS released all liens based on the continuing violation theory. Petitioners argue that the statute of limitations was tolled by the **fraudulent concealment of material facts** by Respondent prior to July 12, 1994. Authorities: Dziura v. *U.S.*, 168 F.3d 581; *Hurt v. U.S.*, 914 F.Supp. 1346; *Gross v. U.S.*, 676 F.2d 295; *Wehrman v. U.S.*, 830 F.2d 1480; *Page v. U.S.*, 729 F.2d 818. **App. 96-100**

.9. Petitioners' complaint filed July 11, 1996, included a cause of action for judicial review of IRS withholding of records pursuant to 5 U.S.C. section 552(a)(4)(B), relevant to William Johnson's "Record of Audit Activity and AIMS Update," which was withheld from the May 6, 1992, disclosure. In (Doc 10) filed Dec. 30, 1997, petitioners alert the district court to the

fact that it is very likely that the Dept. of Justice is in violation of Title 28, Chapter 1 Part 50 [Order No. 530-73], **App. 68-69** Respondent moved for summary judgment arguing that it fully complied with the FOIA. Petitioners had included copies of their correspondence with IRS disclosure both prior to and after July 12, 1994, the date the Tax Court decision was entered, in their separate attachment, correspondence, filed in district court on Sept. 24, 1996. Petitioners outlined their efforts to obtain their 1981, 1982 and 1983, records in their opposition to Respondent's motion for summary judgment, (Doc 39). The district court stated in its order dated Mar. 29, 1999, (Doc 43), **App. 24,** "However, the court has granted Defendant's motion for summary judgment on both of Plaintiffs' remaining claims under both 26 U.S.C. sections 7422 and 7433. Accordingly, Plaintiffs no longer have a need for additional discovery from Defendant. Defendant's motion for summary judgment accordingly is GRANTED." Respondent states in its Appeals Brief, pg. 41, "It was not located, and in all likelihood it was one of the documents that earlier had been destroyed by the IRS." See **App. 58,** Handwritten notes; **App. 74,** 26 C.F.R. section 601.702(c)(12), Preservation of records; **App. 63,** 5 U.S.C. section 301, Departmental regulations; **App. 65,** 18 U.S.C. section 2071(b), destroys documents. Petitioners argue that considering the fact that the district court, in granting Respondent's motion for summary as to petitioners' 26 U.S.C. section 7433 cause of action based on what the court assumes petitioners knew prior to the July 12, 1994, Tax Court decision, the withholding and destruction of William Johnson's "Record of Audit Activity and AIMS Update" is highly relevant to Respondent's **fraudulent concealment of material facts.**

.10. Petitioners' discovery requests included the

the inspection of the document, "District Counsel's Response." Respondent claimed that this document was protected by Attorney Client Privilege, **ONLY.** Petitioners first addressed the issue of Attorney Client Privilege in (Doc 28), pg. 8, filed in district court on May 22, 1998. Petitioners briefed the Attorney Client Privilege claim in their opposition (Doc 39) to Respondent's motion for summary judgment, filed June 19, 1998. The district court **added** the deliberative process privilege claim in its order dated Mar. 29, 1999, (Doc 43), **App. 9,** which could only have applied to the document, "District Counsel's Response." The district court in its order, (Doc 51), filed July 14, 1999, page 2, states, "The court finds Plaintiffs motion for reconsideration to be without merit. Plaintiffs have in large part presented the court with arguments already heard and dismissed. Further, although Plaintiffs have pointed to certain alleged clerical errors and minor mistakes made by the court in its Order, such errors are not sufficient to warrant reconsideration of this court's grant of summary judgment in favor of Defendants." Petitioners argue that the **addition** of the deliberative process privilege claim in its order is neither a minor mistake nor a clerical error, but, shows the partiality of the district court in favor of Respondent.

11. On April 30, 1998, Petitioners filed their motion for summary judgment as to their 26 U.S.C. section 7422 claims for refund, (Doc 22) which included a copy of the Appeals Settlement Memorandum and the Tax Court decision entered July 12, 1994, attached as proof that petitioners as a matter of fact had no federal tax liability for tax years 1981, 1982 and 1983. On May 21, 1998, Respondent filed its opposition (Doc 29) to petitioners' motion for summary judgment, which included a statement of material facts not in dispute. On June 1, 1998,

Respondent filed its motion for summary judgment (Doc 34) relevant to petitioners' causes of action as to 26 U.S.C. sections 7422, 7433 and 5 U.S.C. section 552(a)(4)(B) which included another statement of material facts not in dispute. On June 5, 1998, petitioners filed their opposition (Doc 36) to Respondent's statement of material facts not in dispute (Doc 29). Petitioners disputed the alleged facts at no. 2., no. 4., no. 5. And no. 6. That as a matter of fact, petitioners had no legal income tax liability, civil penalties or additions to tax for either 1981, 1982 or 1983 an that no notice of deficiency was sent to petitioners on Sept. 3, 1987. On June 19, 1998, petitioners filed their opposition (Doc 39) to Respondent's motion for summary judgment (Doc 34) in which they disputed Respondent's alleged facts at no. 3., no 5., no. 6., no.7. and no. 12. Respondent did not send notices of deficiency to either William Johnson or Linda Johnson on Sept. 3, 1987; Petitioners had no income tax liability for 1981; petitioners had no civil penalty for 1982 and Respondent's list of petitioners' FOIA requests contained errors and was not complete. On June 19, 1998, there were four issues presented by motion for summary judgment by Respondent as to material facts which petitioners disputed, (1) whether Respondent sent notices of deficiency to either William Johnson or Linda Johnson on Sept. 3, 1987, (2) whether petitioners had an income tax liability for 1981, (3) whether petitioners had a civil penalty for 1982, (4) whether the IRS fully complied with the FOIA. When Respondent filed its motion for summary judgment (Doc 34), petitioners motion to compel (Doc 19) was outstanding and included petitioners' request for documents & material relevant to IRS Project 21, see **no. 5.** above. Petitioners presented to the district court in their (Doc 35) and Attachment no. 11.,

evidence that information relevant to IRS Project 21 did in fact exist. **App. 60-61** The district court in its order filed Mar. 29, 1999, states, "In addition, Defendant represents that many of the documents requested have already been provided to Plaintiffs and those which were refused do not exist or are not relevant to the claims asserted in the instant case." The information relevant to IRS Project 21 is highly relevant to whether Respondent sent notices of deficiency to either William Johnson or Linda Johnson on Sept. 3, 1987. Petitioners' motion to compel (Doc 20) was also outstanding and included petitioners' request for inspection of the document, "District Counsel's Response." See **no. 5** above. This document was included by reference in the Appeals Settlement Memorandum. **App. 47** Reference is made to "this approach is consistent with Counsel advice." **App. 56** Reference is made to District Counsel in "Reviewers Report." **App. 50-51** Reference is made to District Counsel in Addendum to 4318. **App. 54** The District Counsel's Response" is relevant to the issues in dispute of whether Respondent sent notices of deficiency to petitioners on Sept. 3, 1987, and whether petitioners had an federal income tax liability for 1981 or a civil penalty for 1982. The document "District Counsel's Response' contains directions to staff. **App. 56** Petitioners' Jan 21, 1998, request for inspection of documents (2 SR) at no. 1. Revenue Agent's workpapers relevant to the preparation of Sept. 3, 1987, notice of deficiency mailed to William H. Johnson at 118 East Locust St., Ephrata, PA 17522. Respondent's response: The United States will produce the requested documents to the extent they are still in existence at a time and place to be determined by mutual agreement between the parties. (8 SR) In petitioners' motion for extension of time for discovery (Doc 25) pg. 9, at no. 31., petitioners state,

"Specifically, the documents relevant to plaintiffs' Requests For Inspection which have been either withheld or destroyed by Defendant or which never existed are: etc. Respondent did not produce any of the Revenue Agent's workpapers relevant to the preparation of the Sept. 3, 1987, notice of deficiency mailed to William H. Johnson at 118 East Locust St., Ephrata, PA 17522. The existence of these workpapers is relevant to the disputed issues of whether petitioners had an income tax liability for 1981 or a civil penalty for 1982. Appeals & District Counsel would not support a 2nd notice of deficiency without the workpapers. **App. 49, 51, 54** The number of documents of which petitioners requested inspection, which Respondent did not produce is relevant to the **fraudulent concealment of material facts** relevant to this case. Petitioners' motion (Doc 25) for extension of time for discovery was denied, which included a request for a discovery conference which was ignored by the district court. Petitioners' motion (Doc 33) for *in camera* inspection of withheld discovery documents was ignored by the district court. Petitioners' request (5 SR) for identification of persons pursuant to Fed.R.Civ.P. Rule 26(b)(1) was not responded to by Respondent. None of petitioners' interrogatories or admissions were answered. (19 SR) In support of its motion for summary judgment, Respondent submitted exhibits lettered A to Z. Exhibits B & K are copies of notices of deficiency dated Sept. 3, 1987, for William Johnson & Linda L. Johnson for tax years 1981, 1982 and 1983. No proof of mailing either certified or registered mail was included nor were any Revenue Agent's workpapers included with these exhibits. Exhibits B & K prove that the notices contained addresses known by the IRS to be **invalid** as early as May 7, 1986. Exhibits A,C,F & J are certificates of official record relevant to tax years 1981, 1982 and

1983, for Linda L. Johnson, William H. Johnson and Linda L. & William H. Johnson which indicated that this was a Substitute for Return case dated 06/09/1986, and that a series of assessments started 02/22/1988 and a series of abatements ended 06/20/1994. Exhibit J shows that assessments were made on 03/21/1994, during the period of restrictions pursuant to 26 U.S.C. section 6213. **App. 66** What these exhibits don't show is that the 02/22/1988 assessments were made without valid notices of deficiency for 1981, 1982 and 1983, tax years for William H. and Linda L. Johnson. These assessments were legally unenforceable. Exhibits L to X are relevant to FOIA and include affidavits of Maureen McGovern and Jean S. Pare, two IRS disclosure office employees who were involved in the **fraudulent concealment of material facts.** see **no. 3.** above Exhibit Y is an affidavit relevant to "District Counsel's Response" of IRS senior attorney John Sheffield. Exhibit H is a copy of the Dec.2, 1993, notice of deficiency and Exhibit I is a copy of petitioners' Tax Court petition filed Feb. 22, 1994. A document which wasn't included in these exhibits was a copy of the Tax Court decision entered July 12, 1994, which indicates that petitioners had no deficiencies nor additions to tax for years 1981, 1982 and 1983. Petitioners' opposition (Doc 39) included their statement of material facts no. 1. To no. 87. With reference to their Attachment no. 12., 58 pages of supporting evidence and reference to their Attachment no. 10., 46 pages of supporting evidence. Petitioners make reference at no. 45., to "denied fair hearing." Petitioners make reference at no. 60., to RO Grimes telephone call on 3-23-93. **App. 50** Petitioners supplied the district court with 12 Attachments, a total of 335 pages of supporting evidence, Attachment no. 12., with their opposition (Doc 39). These attachments included: no less than 5 copies of the

"Appeals settlement Memorandum"; 3 copies of the Tax Court decision; 3 copies of Mrs. Johnson's "History"; 3 copies of Mrs. Johnson's "Record of Audit Activity and AIMS Update"; 3 copies of petitioners' July 14, 1986, letter; 2 copies of RO Grimes "Investigation History", Re: 3-23-93; 1 copy each of: Reviewers Report; IRS Memo; Response to Reviewer's Report; and Addendum to 4318. Attachment no. 1, which was filed with petitioners' complaint included all above copies except petitioners' July 14, 1996, letter and RO Grimes "Investigation History", Re: 3-23-93. Petitioners argue that the granting of Respondent's motion for summary judgment was inappropriate before petitioners were able to obtain responses to their discovery requests, *Snook*, 859 F.2d at 866, **2. Federal Civil Procedure,** If documents or other discovery sought would be relevant to issues presented by motion for summary judgment, opposing party should be allowed opportunity to utilize discovery process to gain requested materials. **3. Federal Civil Procedure,** Generally summary judgment is inappropriate when party opposing motion has been unable to obtain responses to his discovery requests. *Parrish*, 533 F.2d at 948, It is horn-book law that a trial court may not grant a motion for summary judgment unless "the basic facts are undisputed and there is no dispute between the parties as to any factual inferences that may be drawn from such facts ..." *Sinderman v. Perry.* Authorities: *Snook v. Trust Co.of Georgia Bank of Savannah, N.A.*, 859 F.2d 865 (11th Cir. 1988) **App. 100;** *WSB-TV v. Lee*, 842 F.2d 1266 (11th Cir. 1988) **App. 105;** *Cowan v. J.C. Penney Co., Inc.*, 790 F.2d 1529 (11th Cir. 1986) **App. 108;** *Murrell v. Bennett*, 615 F.2d 306 (5th Cir. 1980) **App. 111** Petitioners also argue that Respondent failed to carry its initial burden under Fed.R.Civ.P. Rule 56(c)of demonstrating the absence of a genuine issue of

material fact. *See Adickes*, 398 U.S. 144. *Celotex*, 106 S.Ct. at 2552. Authorities: *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, **App. 117;** *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, **App. 119;** *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, **App. 121.**

.12. On May 5, 1999, petitioners filed their motion (Doc 48) for judge disqualification pursuant to U.S.C. section 144, together with their affidavit and 61 page Attachment no. 15. of supporting evidence. On July 14, 1999, petitioners' motion for judge disqualification was denied by the district court, (Doc 51). On July 23, 1999, petitioners filed their motion (Doc 52) for reconsideration of the July 14, 1999, district court's order, (Doc 51). On Dec. 15, 1999, the district court filed its order relevant to petitioners' motion, (Doc 52). The district court refers to its application of 28 U.S.C. section 455(a) and incorrectly states that the alleged bias and prejudice in order to be disqualifying "must stem from an extrajudicial sourse, etc." **App. 33** Petitioners argue that based on the record in this case, the district court demonstrated bias in favor of Respondent and prejudice against petitioners in judging this case. That the district court abused its discretion by not disqualifying itself pursuant to 28 U.S.C. section 455(a). Authorities: *U.S. v. Brown*, 539 F.2d 467 (5th Cir. 1976) **App. 132;** *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, (5th Cir. Tex 1983) **App. 132;** *Roberts v. Bailer*, 625 F.2d 125 (6th Cir. 1980) **App.133;** *U.S. v. Alabama*, 828 F.2d 1532, 1538-41 (11th Cir. 1987) **App. 134.**

.13. The Court of Appeals affirmed the district court's decision on all counts with the only comment, "We find no merit in any of appellant's challenges. We add a brief word with respect to appellant's claim that the district court should be recused. The claim is baseless. The court went to considerable lengths to afford appellants fair treatment; it certainly did not

give them short shrift." **App. 2** Based on the facts and evidence presented by petitioners in this case, petitioners argue that the Court of Appeals did not apply the proper standards in evaluating the district court's decision to grant Respondent's motion for summary judgment. Authorities; *Combs v. King*, 764 F.2d 818, (11th Cir. 1985) **App. 124;** *Mercantile Bank & Trust v. Fidelity & Deposit Co.*, (11th Cir. 1985), **App. 125;** *Thrasher v. State Farm Fire & Cas. Co.*, 734 F.2d 637 (11th Cir. 1984) **App. 127;** *United States v. Diebold*, 369 U.S. 654 (S.Ct. 1962) **App. 129.**

.14 Petitioners filed a timely motion for judge disqualification together with their affidavit and 61 pages of supporting evidence. Petitioners filed a motion for reconsideration of their motion for judge disqualification. Both of petitioners motions relevant to judge disqualification were denied by the district court. If trial judge was required to disqualify himself under 28 U.S.C. section 455, but did not, Court of Appeals must reverse judgment and order new trial before different judge, *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, (5th Cir. 1980), **App. 134;** *United States v. Alabama*, 828 F.2d 1532, 1539-41 (11th Cir. 1987)

.15. On Jan. 25, 2000, petitioners filed their motion for appointment of a special master and their affidavit, to hold hearings relevant to the IRS disclosure misconduct and Respondent's Trial Attorney's misconduct during district court discovery. Petitioners had received no meaningful hearing within the IRS and no hearing by the district court. On April 24, 2000, the Court of Appeals filed its Order: " Because all of the appellants' substantive claims have been properly dismissed, their motion for appointment of a special master, brought pursuant to Fed.R.App.P. 48, is DENIED as moot. **App. 3** Petitioners argue that they were deprived of their Fifth Amendment right to a

meaningful hearing by the IRS, by the district court and finally by the Court of Appeals.

CONCLUSION

For the reasons stated above, William H. Johnson and Linda L. Johnson respectfully request that the Court grant their petition for certiorari.

Respectfully Submitted,
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Linda L. Johnson
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(404 299-7430
pro se

Dated: December 2000

William H. Johnson

Linda L. Johnson

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

WILLIAM H. JOHNSON,	:	No. 99-13569
LINDA L. JOHNSON,	:	D.C. Docket
Petitioners,	:	96-01757-CV
Versus	:	
UNITED STATES OF AMERICA,	:	Filed
INTERNAL REVENUE SERVICE,	:	Apr. 24,2000
	:	

Appeal from the United States District Court
For the Northern District of Georgia

Before TJOFLAT, EDMONDSON, and HULL,
Circuit Judges

PER CURIAM:

In this appeal, appellants challenge

1) The district court's dismissal of appellants' claim for damages under Section 7433 of the Internal Revenue Code (on the ground that the statute of limitations barred the claim);
2) The district court's ruling that the doctrine of res adjudicata barred appellants' refund claims;
3) The district court's grant of summary judgment for the Government on appellants' Freedom of Information Act claim;
4) The district court's denial of appellants' motion for reconsideration, for stay of judgment pending appeal, and for recusal; and

5) The district court's denial of appellants' motions to compel discovery.

We find no merit in any of appellants' challenges. We add a brief word with respect to appellants' claim that the district court should have recused. The claim is baseless. The court went to considerable lengths to afford appellants' fair treatment; it certainly did not give them short shrift.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-13569
Non-Argument Calendar

D.C. Docket 96-01757-CV-JOF-1

WILLIAM H. JOHNSON,
LINDA L. JOHNSON,

Plaintiffs-Appellants,

Versus

UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Georgia

ORDER:

Because all of the appellants' substantive claims have been properly dismissed, their motion for the appointment of a special master, brought pursuant to Fed.R.App.P. 48, is DENIED as moot.

"s/ Gerald Brad Tjoflat" .

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WILLIAM H. JOHNSON and LINDA L. JOHNSON, Plaintiffs,	:	
Vs	:	CIVIL ACTION NO 1:96-CV-1757-
UNITED STATES OF AMERICA and INTERNAL REVENUE SERVICE, Defendants.	:	JOF Filed Mar. 29,1999

ORDER

This matter is before the court on plaintiffs' motions to compel discovery [19-1, 20-1], Plaintiffs' motion to serve additional interrogatories [21-1], Plaintiffs' motion for summary judgment [22-1], Plaintiffs motion for extension of time for discovery [25-1], Defendant's motion for sanctions [30-1], Plaintiffs' motion for extension of time to file a consolidated pretrial order [32-1], and Defendant's motion for summary judgment [34-1].

I. **Statement of the Case**

Plaintiffs William H. Johnson and Linda L. Johnson filed a *pro se* complaint against the United States Government on July 11, 1996, alleging nineteen causes of action arising from collection of taxes by the Internal Revenue Service ("IRS") and the State of Georgia. Plaintiffs sought refunds, costs, and damages pursuant to 28 U.S.C. Section 1346(a), 26 U.S.C. Sections 7422, 7430, 7432, and 7433 for unauthorized tax collection actions for 1988, 1989 and 1990. Plaintiffs also requested judicial review of withheld records pursuant to the Freedom of

Information Act ("FOIA"), 5 U.S.C. Section 552(a)(4)(B). On September 13, 1996, Defendant filed a motion to dismiss, arguing that Plaintiffs had not met jurisdictional requirements for these causes of action to proceed in this court. On September 26, 1997, this court issued an order granting in part and denying in part Defendant's motion to dismiss.

In their original complaint, Plaintiffs challenged the practice of the IRS from 1989 through 1991 of placing levies on both their Georgia state income tax refunds and federal income tax refunds for 1988, 1989 and 1990 and applying those refund amounts to federal tax deficiencies owed by Plaintiffs for the years 1981 through 1983. Plaintiffs specifically challenged seven such acts by Defendants, arguing that they were entitled to refunds pursuant to 26 U.S.C. Section 7422 and to corresponding statutory interest on those refund amounts. Reading the complaint and additional materials submitted by Plaintiffs, this court determined that Plaintiffs had not shown sufficient jurisdictional allegations for the court to consider claims for refunds of the Georgia state taxes which Plaintiffs argued were overpaid. (Sept. 26, 1997 Order at 8). However, the court refused to dismiss Plaintiffs' claims of overpayment of federal taxes and allowed these causes of action to continue.
(Id.)

Also in their original complaint, Plaintiffs claimed that Defendant had engaged in an unauthorized collection action in violation of 26 U.S.C. Section 7433 and had improperly failed to release a tax lien in violation of 26 U.S.C. Section 7432. The court read Plaintiffs' pleadings specifically to allege that between 1988 and 1994, six tax liens were filed against them and that these liens were not released until July 29,1994 and May 10, 1995, even though they were unenforceable. (Sept. 29, 1997 Order at 12).

Defendant sought dismissal on the grounds that Plaintiffs had failed to exhaust their administrative remedies as to these claims. The court denied Defendant's motion to dismiss, finding that both parties had provided little more than conclusory allegations as to whether or not Plaintiffs had exhausted their administrative remedies prior to filing in this court.

Finally, Plaintiffs' original complaint alleged that Defendants withheld records in violation of the FOIA relevant to tax years 1981, 1982 and 1983. Defendants again argued in their motion to dismiss that Plaintiffs had failed to exhaust the administrative remedies required as a prerequisite to an action under the FOIA. However, the court found sufficient allegations to allow Plaintiffs' FOIA claim to proceed.

Following the September 26, 1997 Order, both Plaintiffs and Defendants sought leave of the court to amend their pleadings. Both motions were granted on June 16, 1998. In their amended complaint, Plaintiffs sought more clearly to state the facts underlying their claims for damages pursuant to 26 U.S.C. Section 7433 and sought to dismiss their claim against Defendants for failure to release liens in violation of 26 U.S.C. Section 7432. Defendant asserted an additional affirmative defense, that Plaintiffs' 26 U.S.C. Sections 7432 and 7433 claims were barred by the statute of limitations.

Presently, the following of Plaintiffs' causes of action remain before the court: (1) An action for unauthorized collection actions in violation of 26 U.S.C. Section 7433; (2) an action for costs and fees pursuant to 26 U.S.C. Section 7430; (3) an action pursuant to FOIA to compel disclosure of records; and (4) a refund action pursuant to 26 U.S.C. Section 7422 and corresponding request for statutory interest awards for the three overpayments of federal income taxes in

1988, 1989 and 1990 in the amounts of $525.00, $630.00, and $186.09, respectively.

II. **Discussion**

A. Summary Judgment

Summary judgment under Fed.R.Civ.P.56 is appropriate "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To defeat the motion for summary judgment, the nonmoving party must merely present evidence on the basis of which a jury might return a verdict in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The nonmoving party in a summary judgment motion is to be given the opportunity to "discover information that is essential to his opposition." *Anderson*, 477 U.S. at 250. Under Rule 56(f) of the Federal Rules of Civil Procedure, a nonmoving party may file an affidavit with the court representing an inability to present facts necessary to oppose the summary judgment motion, and in response the court may "refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Fed.R.Civ.P.56(f).

A party is not required formally to style a discovery request as a Rule 56(f) motion; a pending discovery motion can be sufficient to raise concerns as to whether a party should be permitted additional discovery prior to resolution of a summary judgment motion. *Snook v. Trust Co. of Georgia Bank of Savannah, N.A.*, 859 F.2d 865, 871 (11th Cir. 1988); *Garrett v. City and County of San Francisco*, 818 F.2d 1515, 1518 (9th Cir. 1987); *Phillips v. General Motors Corp.*, 911 F.2d 724, 1990 WL 117981 at ** 5

(4th Cir. 1990). Where there are both pending discovery requests and pending summary judgment motions in a case, it is an abuse of district court discretion to grant the motion for summary judgment without first considering the discovery motions. *Snook*, 859 F2d at 871; *Webb v. Bunch*, 16 F.3d 1223, 199[illegible] WL 36854 (6th Cir. 1994).

A district court considering summary judgment motions along with discovery requests should look at factors such as whether the nonmoving party has sufficiently identified the information sought through discovery, the reasons the information has not yet been obtained, and the materiality of the requested information to the summary judgment motion. *Phillips*, 1990 WL at **5. Where the documents are relevant to the summary judgment motion and are discoverable, the district court should rule on the discovery motions before the summary judgment motion. *Snook*, 859 F.2d at 871. However, where a nonmoving party has made no showing of specific evidence expected to be obtained through discovery and has not shown how such evidence will impact the pending summary judgment motion, a ruling on the summary judgment motion is not precluded. *Patterson v. United States Postal Service*, 901 F.2d 927, 929 (11th Cir. 1990); *Public Service Co. of Colorado v. Continental Casualty Co.*, 26 F.3d 1508, 1518 (10th Cir. 1994); *International Corp. v. Welch Foods, Inc.*, 13 F.3d 478, 488 (1st Cir. 1994). Broad discovery requests generally are not sufficient to prevent the court from ruling on a summary judgment motion. *See Phillips*, 1990 WL at **5; *Garrett*, 818 F.2d at 1518.

Currently pending before the court are summary judgment motions submitted by both Plaintiffs and Defendants, as well as numerous discovery motions submitted by Plaintiffs. The court will first consider Plaintiffs' discovery motions, taking into consideration

the impact the information requested has on Plaintiffs' response to Defendant's motion for summary judgment.

B. Plaintiffs' Discovery Motions

Plaintiffs' first motion to compel seeks inspection of certain documents which Plaintiffs included in their request for production of documents served on Defendant. Plaintiffs requested documents such as IRS policy statements, documents relating to particular IRS projects, and information relating to complaints filed by Plaintiffs. Plaintiffs claim that Defendant objected to these various requests on the basis of relevancy, and on the basis that some documents would contain information pertaining to taxpayers other than Plaintiffs.

Plaintiffs' second motion seeks to compel Defendant to permit inspection of certain documents. Plaintiffs cite ten requests that were served upon Defendant which they claim were not satisfied. The documents Plaintiffs request are various internal documents of the IRS, such as memoranda transmitting Plaintiffs' files between offices, documents and files relating to the mailing of deficiency notices to Plaintiffs, documents and files relating to the rejection of Plaintiffs' Offer in Compromise submitted to the IRS, and documents pertaining to Plaintiffs' petition filed in the Tax Court. Plaintiffs claim that Defendant objected to these requests under the explanation that they were not relevant or reasonably calculated to lead to admissible evidence, and that certain documents were protected by the attorney-client privilege or the deliberative process privilege.

In both motions to compel, Plaintiffs give the same reasoning in support of each request for production. They argue that the documents they

request would "demonstrate evidence of routine practice by the Internal Revenue Service and demonstrate bias and prejudice in the treatment of the Plaintiffs relevant to the examination and collection of federal taxes for tax years 1981, 1982 and 1983." Plaintiffs argue that therefore the documents they request constitute relevant evidence.

Having read and considered Plaintiffs motions to compel production of documents and Defendant's responses thereto, the court cannot find that Plaintiffs are entitled to relief. They have shown no connection between the documents they request and any specific cause of action brought against Defendant. In addition, Defendant represents that many of the documents requested have already been provided to Plaintiffs and those which were refused either do not exist or are not relevant to the claims asserted in the instant case. Finally, the court finds that Plaintiffs have not represented to the court that any information sought in the requested documents would have any impact on the motions for summary judgment pending before the court. Therefore, Plaintiffs' motions to compel are DENIED.

2. *Motion for Leave to Serve Additional Interrogatories*

Plaintiffs filed a motion for relief from the interrogatory limitation. They assert that they misunderstood the terms "interrogatory" and "party" under the Local Rules and the Federal Rules of Civil Procedure and mistakenly filed 146 interrogatories upon Defendant. They now request leave to properly serve all 146 interrogatories or such other number as the court sees fit. Defendant responded to Plaintiffs' motion, citing the limitations of both the federal and local rules and their objection to both the number and substance of Plaintiffs' interrogatories.

Neither party has provided the court with a copy of

the interrogatories Plaintiffs' seek to have answered by Defendant, and neither has informed the court which, if any, of Plaintiffs' initial interrogatories were answered. The court therefore cannot determine whether there is cause to permit Plaintiffs to exceed the limitations provided in the federal and local rules. Accordingly, Plaintiffs motion for relief from interrogatory limitation is DENIED.

C. Defendant's Motion for Summary Judgment

Defendant filed a motion for summary judgment as to all of Plaintiffs' causes of action on June 2, 1998. Plaintiffs filed an opposition to Defendant's statement of facts not in dispute on June 5, 1998 and an opposition to Defendant's summary judgment motion on June 19, 1998. The parties agree to the following undisputed facts. 1 The IRS made assessments of federal income taxes, interest and penalties against Plaintiffs during the years 1981, 1982 and 1983. In 1988, 1989 and 1990, Plaintiffs filed Form 1040 income tax returns which reported overpayments of $525.00, $630.00 and $186.09, respectively. Plaintiffs overpayment of 1988 federal income taxes in the amount of $539.43 was applied to the income tax liability assessed by the IRS for 1981. 2 Plaintiffs' overpayment in 1989, in the amount of $652.94 was also applied to Plaintiffs' tax liability as assessed by the IRS for 1981.

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1 Under Local Rule 56.B(2), all material facts contained in Defendant's statement of material facts which were not specifically controverted in Plaintiffs' response are deemed to have been admitted.

2 In their response to Defendant's statement of facts, Plaintiffs dispute the fact that a tax liability was actually owed to the IRS during the years of 1988, 1989 and 1990 but do not dispute the fact that the

Plaintiffs' overpayment for 1990 in the amount of $186.09 was applied to a civil penalty assessed by the IRS for the year 1982. The IRS sent a notice of deficiency to Plaintiffs on December 2, 1993 listing the amounts of deficiency assessed for the years 1981, 1982 and 1983. On February 24, 1994, Plaintiffs filed a petition in the United States Tax Court requesting a redetermination of the deficiencies as determined by the IRS and reflected in the December 2, 1993 notice of deficiency. On July 12, 1994, pursuant to an agreement of the parties, the Tax Court entered an order "[t]hat there [we]re no deficiencies in income tax due from, nor overpayment due to, the petitioners for the taxable years 1981, 1982 and 1983." The activities which form the basis for Plaintiffs' 26 U.S.C. Section 7433 claim for unauthorized collection occurred between September 2, 1988 and March 21, 1994.

Plaintiffs made numerous requests for documents under the FOIA with respect to taxable years 1981 through 1983. On February 4, 1985, Plaintiffs were given 107 pages of examination documents for the years 1981, 1982 and 1983 from the Philadelphia Disclosure Office. The Atlanta Disclosure Office gave Plaintiffs 90 pages of documents on December 17, 1990, 418 pages on February 6, 1991, 347 pages on February 13, 1991, 4 pages on April 15, 1991, and 165 pages on May 9, 1992. On December 15, 1995, Plaintiff Linda L. Johnson submitted a FOIA request, and Disclosure Specialist Maureen McGovern conducted a search for documents responsive to that request. Mrs. Johnson's request asked for "all examination files for tax years 1981, 1982 and 1983." In accessing Mrs. Johnson's individual master file account ("IMF"), Ms. McGovern necessarily accessed

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2 overpayments were used to satisfy these liabilities claimed by the IRS.

Mr. Johnson's records as well, as Jointly filed documents are listed under the husband's social security number on the IMF. Ms. McGovern thus conducted a search of all documents listed under Mr. Johnson's IMF account as well. Ms. McGovern then provided Mr. and Mrs. with all releasable documents from both their IMF accounts. Ms.McGovern ordered all documents listed as applicable to Plaintiffs from the IRS Service Centers and Federal Records Center and analyzed all such documents that had not already been destroyed to determine whether they could be released pursuant to 5 U.S.C. Section 522(b). Ms McGovern then withheld and redacted some documents and notified Mrs. Johnson that the remaining documents were subject to disclosure by letter March 14, 1996. On March 20, 1996, Mr. Johnson also filed a FOIA request for all examination materials for years 1981, 1982 and 1983 which were indexed under his social security number. On March 25, 1996, the Disclosure Office notified Mr. Johnson by letter that all documents available for both him and Mrs. Johnson in the March 14, 1996 response to her FOIA request. Mr. Johnson sent another FOIA request. reiterating his initial request, to Atlanta District Disclosure Office on April 1, 1996, and again the office responded, by letter dated April 4, 1996, that all available records had already been disclosed.

1. *26 U.S.C. Section 7422 Claims*

Plaintiffs' claim for refund under 26 U.S.C. Section 7422 rests on the alleged illegality of the February 28, 1988 assessments of income tax deficiencies made against them for the years 1981, 1982 and 1983. Plaintiffs argue that Defendant violated 26 U.S.C. Section 6212, which requires that a notice of deficiency be provided to a taxpayer by certified or

registered mail at his last known address before any deficiency proceedings are undertaken. Plaintiffs argue that no such notice of deficiency was provided to them prior to the assessment. Plaintiffs thus argue that the assessments of deficiencies were illegal, and that any overpayments made which were applied to satisfy these deficiencies should be refunded. Defendant asserts that the issue of whether Plaintiffs are entitled to refunds for overpayments made in 1988, 1989 and 1990 was already decided by the Tax Court, and that decision should be given effect as *res judicata*. Defendant argues that the overpayments in 1988, 1989 and 1990 were in fact allowed and properly applied to satisfied income tax liabilities assessed for years 1981, and 1982 under 26 U.S.C. Section 6402(a), which allows the IRS to credit the amount of any overpayment against liabilities for income tax on the part of the person who made the overpayment. Defendant contends that because the Tax Court entered its decision on July 12, 1994, after the overpayments were applied to the tax liabilities, and determined that no overpayments were due to be refunded to Plaintiffs, that this court has no jurisdiction to review that decision under the doctrine of *res judicata*.

The doctrine of *res judicata* requires: (1) that the issue litigated in both proceedings be identical; (2) that the parties to the proceeding are the same as or are privity with the parties to the earlier proceeding; and (3) that the earlier proceeding resulted in a final judgment on the merits. *Baptise v. Commissioner*, 29 F3d 1533, 1539 (11th Cir. 1994); *Nevada v. United States*, 463 U.S. 110 (1983). After consideration of the issues litigated before the Tax Court and the cause of action presently before this court, the court finds that the Tax Court decision is *res judicata* in the instant action.

First, the court finds that the issue litigated in the earlier proceeding before the Tax Court is identical to the issue presently before the court. Plaintiffs received a notice of deficiency from the IRS on December 2, 1993 which listed deficiencies in their income tax payments in the following amounts: $13,338.00 for tax year 1981; $7,012.00 for tax year 1982; and $15,483.00 for tax year 1983. Plaintiffs filed a petition with the United States Tax Court on February 22, 1994 requesting a redetermination of the deficiencies set forth in the December 2, 1993 notice. In support of their petition to the Tax Court, Plaintiffs set forth the following facts and contentions. They alleged first that on September 3, 1987, the IRS deliberately mailed notice of an income tax deficiency to an incorrect address where they knew Plaintiffs would not receive the notice and that the IRS had failed to exercise due diligence in obtaining the correct address as required by the Internal Revenue Code. They contended that because this original notice was defective, the assessment made on February 22, 1988 was illegal and that all action taken on the basis of that assessment of liability was consequently unauthorized. Specifically, Plaintiffs complained that the IRS had wrongfully seized their federal tax refunds for the years 1988, 1989 and 1990 and applied these overpayments to the illegal deficiency. Although Plaintiffs acknowledged receiving notice of the deficiency through the December 2, 1993 letter, they complained that such notice was sent "out of time." On June 12, 1994, the Tax Court issued an order pursuant to an agreement between the parties. The court stated that "[t]here [we]re no deficiencies in income tax due from, nor overpayments due to, the petitioners for the taxable years 1981, 1982 and 1983."

The court finds that Plaintiffs' 26 U.S.C. Section

7422 claim presently before the court, which requests refunds of overpayments made in the years 1988, 1989 and 1990 which were applied to deficiencies for tax years 1981, 1982 and 1983 is identical to the issue raised by Plaintiffs in their petition to the Tax Court filed February 22, 1994. Plaintiffs' causes of action brought before the Tax Court and before this court both rely on the theory that the overpayments were wrongfully applied to deficiencies which were calculated on the basis of an illegal assessment. This issue was resolved pursuant to the settlement of the parties as reflected in the July 12, 1994 order of the Tax Court.

Second, the court finds the privity element of the doctrine of *res judicata* satisfied. The Commissioner of the IRS, the party named in Plaintiffs' original petition to the Tax Court, and the United States, the Defendant in the instant action are in privity for purposes of *res judicata*, for the IRS had the authority to represent the interests of the United States in a final adjudication of the issues before the Tax Court. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1939).

The final issue is whether *res judicata* applies in the context of a Tax Court decision entered pursuant to an agreement between parties, and whether such an order constitutes a judgment on the merits for purposes of the doctrine. *Res judicata* is applicable to the federal income tax field and litigation conducted in the Tax Court. *Commissioner v. Sunnen*, 333 U.S. at 591 (1947). Further, a Tax Court judgment entered pursuant to an agreement between the parties constitutes a judgment on the merits for purposes of *res judicata*, "whether or not the basis of the agreements on which [it] rest[s] reached the merits." *Baptiste*, 29 F.3d at 1539-40, *quoting United States v. International Building Co.*, 345 U.S. 502 (1953). Accordingly, even though the court is unable to

determine from the record whether the agreement reached between the parties before the Tax Court was reached on the basis of the merits of Plaintiffs' contentions or some other collateral consideration, the judgment entered on the basis of the parties' agreement and consent acts as a final judgment on the merits. *International Building*, 345 U.S. at 506.

The elements of the doctrine of *res judicata* are satisfied in the instant case, and the court finds that the parties have already litigated and resolved the issue of whether Plaintiffs' income tax overpayments for 1988, 1989 and 1990 were properly held and applied to deficiencies assessed for the years 1981, 1982 and 1983. Accordingly, the court does not have jurisdiction again to consider Plaintiffs' cause of action brought under 26 U.S.C. Section 7422 for refunds of 1988, 1989 and 1990 overpayments. Therefore, Defendant's motion for summary judgment as to Plaintiffs' Section 7422 claims is GRANTED.

2. *26 U.S.C. Section 7433 Claims*

Defendant next argues that summary judgment should be granted in its favor because Plaintiffs' 26 U.S.C. Section 7433 claim is barred by the statute of limitations. Defendant asserts that Section 7433(d)(3) requires that an action be filed within two years after the date a cause of action accrues, and that the acts Plaintiffs allege as the basis for their Section 7433 claim occurred earlier than two years prior to the filing of the instant case. Plaintiffs argue in response that their right of action did not accrue until the Tax Court decision was entered, because they did not have all the essential elements of a possible cause of action until that date. The Tax Court order was entered July 12, 1994, and therefore Plaintiffs argue that their filing on July 11, 1996 was timely.

Plaintiffs submitted an amended complaint to

amend their Section 7433 cause of action to include an itemized list of illegal collection activities. Plaintiffs list 35 acts that they argue occurred without a legally enforceable assessment, all 35 of which occurred on or before March 21, 1994. Section 7433 provides for civil actions for damages arising out of certain unauthorized collection actions. Such an action "may be brought ... only within 2 years after the date the right of action accrues." 26 U.S.C. Section 7433 (d)(1). The Treasury Regulations promulgated under Section 7433 further provide that "[a] cause of action ... accrues when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action." 26 C.F.R. Section 301.7433-1(g)(2). In response to Defendant's motion for summary judgment, the court must determine whether, as a matter of law, the statute of limitations provided in Section 7433 had already expired when Plaintiffs filed the instant action on July 11, 1996.

The court must first determine which acts of the IRS Plaintiffs are entitled to assert as bases for their Section 7433 action. In their amended complaint, they lists various types of acts, including provision of notice of liens, "extortion" of form 1040 returns, seizure of refunds, enforcement of levies, notices of intent to levy, and assessments of tax due. However, not all acts by the IRS are actionable under Section 7433. Assessment and determination of an amount of tax cannot form the basis of an action under Section 7433. *See Shaw v. United States*, 20 F.3d 182, 184 (5th Cir. 1994). In *Shaw* the Fifth Circuit explained the distinction between assessment and collection activities in relation to Section 7433; that "improper assessment deals with the decision to impose tax liability while improper collection activities involve conduct of an agent trying to collect the taxes owed." *Id.* 184. Relying on legislative history, the court stated

that because Section 7433 created a cause of action for improper *collection* of a tax, that "[a]n action under [Section 7433] may not be based on an alleged reckless or intentional disregard in the connection with the *determination* of a tax," and that accordingly "a taxpayer cannot seek damages under Section 7433 for an improper assessment of taxes." *Id.* At 184 (citations omitted). *See also Miller v. United States,* 66 F.3d 220, 222-23 (9th Cir. 1995) (in challenge to jeopardy assessment made by IRS, summary judgment in favor of IRS on taxpayer's Section 7433 claim was appropriate because assessment and tax determination part of jeopardy assessment process is not a " collection action" within the meaning of Section 7433); *Gonsalves v. Internal Revenue Service,* 975 F.2d 13, 15-16 (1st Cir. 1992) (summary judgment appropriately granted to IRS because action under Section 7433 cannot be based on actions in connection with determination of a tax).

Although actions in connection with assessment and determination are not actionable under Section 7433, notice and demand requirements of collection procedures may be. *See Miller,* 66 F.3d at 222. Though not clearly set forth in their complaint, the court reads Plaintiffs' Section 7433 cause of action to allege that notice was improper in their case because it was not sent to their last known address and because certain deficiencies were sent out of time. (See Pls.' Amended Complt.) Plaintiffs acknowledge that some activities them assert as wrongful collection activities occurred before the effective date of Section 7433, November 10, 1998. In particular, it appears that the notices Plaintiffs complain were improperly not sent to their last known address were issued in September 1987. ("Appeals Settlement Memorandum, page 2, attached to Pls.' Mot. For Summ. J.). Accordingly, Plaintiffs' claim that particular notices were not sent to their last

known address is not actionable under Section 7433.

Plaintiffs also state that notices of deficiencies for years 1981-1983 were filed out of time. As set forth in the undisputed facts, this notice was sent to Plaintiffs on December 2, 1993. Also, Plaintiffs assert that certain notices of tax liens were improperly filed during a period of restriction on January 3, 1994. The court finds these allegedly defective notices of December 2, 1993 and January 3, 1994 actionable under Section 7433. 3 The court thus turns to whether the action was timely filed.

A cause of action under Section 7433 is generally established when an allegedly unauthorized collection action occurs. *See Caprasco v. Commissioner of Internal Revenue,* 907 F. Supp. 1235, 1240 (N.D. Ind. 1995); *United States v. Mansour,* 1997 WL 718456 at *3 (D.Conn. 1997); *Sylvester v. United States,* 978 F. Supp. 1186, 1190 (E.D. Wis. 1997). The latest date for collection actions Plaintiffs assert as the basis for their Section 7433 claim occurred on January 3, 1994. The assumption therefore is that the two-year period of limitations began to run at that time, expiring January 3, 1996.

However, some courts have found the period of limitations to begin running sometime after the collection action, taking into account the Treasury Regulation Section 301.7433-1(g)(2), which allows a

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Note 3 In Plaintiffs' amended complaint, the acts they set forth as constituting illegal collection activities in violation of Section 7433 extended through March 3, 1994. However, the events listed as occurring on that date were assessments, which as discussed above cannot be relied upon for an action under Section 7433. The next most recent dates of activities set forth by Plaintiffs are the notices of January 3, 1994.

taxpayer a reasonable time to discover the elements of the action. *See, e.g. Sylvester,* 978 F. Supp. At 1191 (allowing action to proceed on plaintiff's argument that although collection actions occurred outside period of limitations, plaintiff did not receive IRS file until later date and thus could not have discovered information essential to claim); *Cunningham v. United States,* 165 B.R. 599, 605 (N.D. Tex. 1993) (denying summary judgment on basis that limitations had not run as a matter of law because plaintiffs had received documents relating to the challenged assessments more than two years after the date of the assessments).

However, although a taxpayer has a reasonable time to discover the elements of a Section 7433 cause of action, where there is evidence that a party was actually aware of a cause of action, some courts consider the statute of limitations to begin running at that time. For example, in *Stjernholm v. Patterson,* 85 F.3d 641, 1996 WL 238296 (10th Cir. 1996), a tax liability was established against the plaintiffs in 1991. The Government then seized property from the plaintiffs in April 1992 and sold that property at action in June 1992. The Plaintiffs commenced an action under Section 7433 in October 1994. Plaintiffs argued that their cause of action under Section 7433 was timely because it was filed within two years of their receipt of final notice from the IRS that their claims for refunds had been disallowed. 4 In rejecting the plaintiffs' argument, the Tenth Circuit relied on the fact that the plaintiffs had published a "public notice" in August 1992 in a newspaper reflecting their opinion that the IRS had committed procedural violations in conducting the sale and seizure of their property and

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Note 4 The plaintiffs in that case relied on *Gonsalves v. United States,* 782 F. Supp. 164 (D. Me. 1994),

had engaged in illegal activities. *Id.* At *2. The court held that the publication of the public notice "plainly show[ed] that [the plaintiffs] then knew all essential elements of their claim." *Id. See also Anderson v. Zenali,* 1996 WL 628180 at *3-4 (C.D. Cal. 1996), aff'd, 129 F.3d 124 (9th Cir. 1997) (finding that, in case involving challenge to IRS sale of property, statute of limitations began to run at the latest on the date plaintiffs brought action for quiet title because " it [w]as disingenuous for plaintiffs to argue that they did not have a reasonable opportunity to discover that they were harmed by the sale ...when they had already instituted a suit against the purchaser of the property").

Plaintiffs argue that their cause of action did not accrue until the decision of the Tax Court, rendered July 12, 1994, and that thus their period of

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Note 4 *aff'd,* 975 F.2d 13 (1994), where the court held that the two-year statute of limitations for Section 7433 claims did not begin to run until the plaintiff had received legal notice from the IRS that his claims for refunds were fully disallowed. In *Gonsalves,* the collection actions complained of occurred in 1987 and 1988, but plaintiff did not receive notice that his claims for refunds were fully disallowed until January 1990. *Id.* At 169. The plaintiff then filed his Section 7433 action in March 1991, and the court allowed it to proceed, holding that the two-year period of limitations began to run in January 1990. *Id.* The Tenth Circuit in *Stjernholm* rejected the plaintiff's argument that the reasoning of *Gonsalves* should apply, because C.F.R. Section 301.7433-1(g)(2) had been enacted since that decision and indicated that a cause of action under Section 7433 was considered to accrue after a reasonable opportunity to discover all elements of the claim. *Stjernholm,* 1996 WL 238296 at *2.

limitations for their Section 7433 action extended until July 12, 1996. The court disagrees. Given the extensive litigation and discovery that had been conducted between Plaintiffs and the IRS prior to July 12, 1994, the court finds that Plaintiffs had a reasonable opportunity to discover the elements of their Section 7433 action. Plaintiffs have offered no explanation as to what events on July 12, 1994 allowed them to discover the elements of their action or permitted their action to accrue. The court therefore has no reason to find that Plaintiffs were unable to discover that the notices provided in December 1993 and January 1994 may have given rise to a cause of action for improper collection procedures. Further, there is evidence that Plaintiffs were actually aware of the elements of their cause of action under Section 7433 prior to July 12, 1994. Plaintiffs filed a petition with the Tax Court on February 22, 1994 stating that the December 2, 1993 notice had been wrongfully sent out of time. (Tax Court Petition at M, submitted with Def.'s Resp. to Pls.' Mot. For Summ. J.). Therefore, there is evidence that at least as early as February 22, 1994 Plaintiffs understood and were aware of the elements of their potential Section 7433 claims.

In light of the evidence of Plaintiffs' actual knowledge as well as the history of the extensive communication and discovery between the parties in this case, the court finds no reason to extend the time for accrual of Plaintiffs' Section 7433 cause of action until July 12, 1994. The court therefore concludes that Plaintiffs' 26 U.S.C. Section 7433 action was untimely. Defendant's motion for summary judgment as to Plaintiffs' Section 7433 claim is GRANTED.

3. *FOIA Claim*

Plaintiffs' original complaint requested judicial review pursuant to 5 U.S.C. Section 552(a)(4)(B) of the

IRS's withholding of records which Plaintiffs argue are not exempt from disclosure. Plaintiffs also claim that the IRS has not responded to their FOIA "administrative appeal" of April 23, 1996.Defendant argues that it has fully complied with the FOIA and thus moves for summary judgment on Plaintiffs' FOIA claim.

Title 5, U.S.C. Section 552(a)(4)(B) authorizes a district court to enjoin an agency from withholding records and order production of those records to a complainant under the FOIA. However, the court has granted Defendant's motion for summary judgment on both of Plaintiffs' remaining claims under 26 U.S.C. Sections 7422 and 7433. Accordingly, Plaintiffs no longer have a need for additional discovery from Defendant. Defendant's motion for summary judgment accordingly is GRANTED.

D. Plaintiffs' Motion for Summary Judgment

Plaintiffs filed a motion for summary judgment on their cause of action for refund of federal taxes pursuant to 26 U.S.C. Section 7422. As discussed above, Plaintiffs' claim under Section 7422 is governed by the doctrine of *res judicata* and the decision of the Tax Court entered on the action between the parties to the instant case on July 12, 1994 is given preclusive effect. Accordingly, Plaintiffs' motion for summary judgment is DENIED.

E. Defendant's Motion for Sanctions

Defendant filed a motion for sanctions on May 22, 1998 pursuant to Fed.R.Civ.P.37(d) against Plaintiffs for failure to appear at their depositions. Defendant contends that on May 5, 1998 a notice of deposition was served upon the Plaintiffs, but that both Plaintiffs failed to appear at their scheduled depositions on May 12, 1998. Defendant asserts that when Plaintiffs were

contacted regarding their failure to appear, the only explanation was that they had not been served with subpoenas. Defendant requests that the court dismiss Plaintiffs' action pursuant to Fed.R.Civ.P.Rule 37(b)(2)(C0 and order that Plaintiffs pay the expenses and reasonable attorneys' fees incurred as a result of the attempted depositions.

Plaintiffs filed a response to Defendant's motion on June 4, 1998 in which they cited numerous instances in which they argue Defendant's counsel was uncooperative with them and failed to disclose certain documents as requested. Plaintiffs do not respond directly to Defendant's allegations that they refused to attend their depositions, but accuse Defendant's counsel of other instances of misconduct.

Having been read and considered and taking into account the fact that Defendant has been awarded summary judgment in the instant case, Defendant's motion for sanctions is DENIED.

F. Motion to Extend Time for Discovery and Time to File Consolidated Pretrial Order

Remaining before the court are Plaintiffs' motions to extend time for discovery and extend time in which to file a consolidated pretrial order. As discussed above, the court has awarded summary judgment in favor of Defendant on all Plaintiffs' remaining claims. Accordingly, Plaintiffs' motions to extend time for discovery and extend time in which to file a consolidated pretrial order are DENIED as moot.

III. **Conclusion**

Plaintiffs' motions to compel discovery [19-1, 20-1] and motion to serve additional interrogatories [21-1] are DENIED. Plaintiffs' motion for summary judgment [22-1] is also DENIED. Defendant's motion for summary judgment [34-1] is GRANTED, and Defendant's motion for sanctions [30-1] is DENIED. Finally, Plaintiffs' motion for extension of time for discovery [25-1] and motion for extension of time to file a consolidated pretrial order [32-1] are DENIED as moot.

SO ORDERED this 29th day of March 1999.

"s/ J. Owen Forrester" .
J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVIAION

WILLIAM H.JOHNSON and LINDA L. JOHNSON,	:	
Plaintiff,	:	CIVIL ACTION
Vs.	:	FILE NO.
	:	1-96-cv-1757-
UNITED STATES OF AMERICA and INTERNAL REVENUE SERVICE,	:	JOF
Defendants.	:	

JUDGMENT

This action having come before the court, Honorable J. Owen Forrester, United States District Judge, for consideration of defendant's Motion for Summary Judgment, and the court having granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendants recover its costs of this action, and the action be, and the same hereby, is **dismissed.**

Dated at Atlanta, Georgia, this 30th day of March, 1999.

LUTHER D. THOMAS
CLERK OF COURT
By: "s/ Wendy S. Evens" .
Deputy Clerk

Prepared, Filed, and Entered
In the Clerk's Office
March 30, 1999
Luther D.Thomas
Clerk of Court
By "s/ Wendy S. Evans" .
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WILLIAM H.JOHNSON and	:	
LINDA L.JOHNSON,	:	
Plaintiffs.	:	
Vs.	:	CIVIL ACTION NO
	:	1: 96-CV-1757-
UNITED STATES OF AMERICA and:		JOF
INTERNAL REVENUE SERVICE,	:	Filed
Defendants.	:	July 14, 1999

ORDER

This matter is before the court on Plaintiffs' motion for reconsideration [45-1]. Plaintiffs' motion for stay of judgment pending appeal [46-1], and Plaintiffs' motion for judicial disqualification [48-1].

This court granted summary judgment in favor of Defendants in the instant case on March 29, 1999. Plaintiff then filed a motion for reconsideration on April 12, 1999. Motions for reconsideration should not be filed as a matter of practice, but only when necessary. *See* LR7.2E. A motion for reconsideration is not a vehicle to present the court with arguments already heard and dismissed. *See Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 577 (10th Cir. 1996); *Caisse Nationale de Agricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996); *Van Skiver v. United States*, 952 F.2d 1241, 1243-44 (10th Cir. 1991), *cert. denied*, 506 U.S. 828 (1992); *United States v. Williams*, 674 F.2d 310, 313 (4th Cir. 1982). A motion that simply asks the district court to change its mind is not authorized by Rule 60. *Williams*, 674 F.2d at 313. Further, it is not appropriate to raise new arguments in a motion for reconsideration that could have raised

when the matter was initially before the court. *Lussier v. Dugger*, 904 F.2d 661, 667 (11th Cir. 1990); *VanSkiver*, 952 F.2d at 1243. *See also Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers*, 916 F.Supp. 1557, 1560 (N.D. Ga. 1995) (O'Kelley, J.) ("a motion for reconsideration is not an opportunity for the moving party and their counsel to instruct the court on how the court 'could have done it better' the first time. Rather, the motion should be reserved for certain limited situations, namely the discovery of new evidence, an intervening development or change in the controlling law, or the need to correct a clear error or prevent a manifest injustice").

The court finds Plaintiffs' motion for reconsideration to be without merit. Plaintiffs have in large part presented the court with arguments already heard and dismissed. Further, although Plaintiffs have pointed to certain clerical errors and minor mistakes made by the court in its Order, such errors are not sufficient to warrant reconsideration of this court's grant of summary judgment in favor of Defendants. Accordingly, Plaintiffs motion for reconsideration is **DENIED.**

Plaintiffs filed a motion on April 19, 1999, requesting this court to stay its entry of judgment in the instant case pending appeal. They cite the court to the fact that a motion for reconsideration was pending in this court at the time the motion was filed. Plaintiffs may appeal this court's grant of summary judgment in accordance with the Federal Rules of Appellate Procedure. To the extent Plaintiffs are concerned about the timeliness of their appeal in light of the time during which their motion for reconsideration has been pending, the court refers Plaintiffs to Rule 4(a)(4) of the Federal Rules of Appellate Procedure. Having been read and considered,

Plaintiffs' motion for stay pending appeal is **DENIED.**

Finally, Plaintiffs ask that the undersigned recuse himself from the instant case due to a bias in favor of Defendant. Pursuant to 28 U.S.C. Section 455(a), a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The standard under Section 455 is objective and requires the court to ask "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990) (citations omitted). Under 28 U.S.C. Section 455, it is well settled that the allegation of bias must show that " the bias is personal as distinguished from judicial in nature." *United States v. Phillips*, 664 F.2d 971, 1002-03 (5th Cir. Unit B 1981), *superseded on other grounds, United States v. Huntress*, 956 F.2d 1309 (5th Cir. 1992); *Phillips v. Joint Legislative Com., etc.*, 637 F.2d 1014, 1019-20 (5th Cir. 1981). As a result, except where pervasive bias is shown, a judge's rulings in the same or a related case are not a sufficient basis for recusal. *Phillips*, 664 F.2d at 1002-03.

Plaintiffs' motion offers no factual evidence of the type of personal bias that would sustain a doubt about the court's impartiality and require recusal. Plaintiffs base their motion solely upon their disagreement with this court's ruling in a prior order.

recusal, however , is not required simply because Petitioner disagrees with the court's handling of the case. *See Hepperle v. Johnston,* 590 F.2d 609, 613-14 (5th Cir. 1979). Further, Plaintiffs' dissatisfaction with the undersigned's judicial decisions and performance in this case is not a sufficient legal basis for recusal. *Id.; Fowler,* 669 F.Supp. at 928-29. Accordingly, Plaintiffs' motion for disqualification is **DENIED.**

For the foregoing reasons, Plaintiffs motions for reconsideration [45-1], for stay of judgment pending appeal [46-1] and for judicial disqualification [48-1] are all **DENIED.**

SO ORDERED this 13th day of July 1999.

"s/ J. Owen Forrester" .
J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WILLIAM H.JOHNSON and	:	
LINDA L.JOHNSON,	:	
Plaintiffs.	:	
Vs.	:	CIVIL ACTION NO
	:	1:96-CV-1757-
UNITED STATES OF AMERICA and	:	JOF
INTERNAL REVENUE SERVICE,	:	Filed
Defendants.	:	Dec. 15, 1999

ORDER

This matter is before the court on Plaintiffs' motion for reconsideration [52-1].

Plaintiffs request this court's reconsideration of its Order issued July 14, 1999 denying their request for reconsideration of this court's order granting summary judgment in favor of Defendant on the merits of the instant action, denying their motion for stay of judgment pending appeal, and denying their motion for disqualification of the undersigned. In the instant motion, Plaintiffs challenge this court's previous order on two grounds.

First, they challenge this court's judgment, entered March 30, 1999, in which it was ordered that Plaintiffs take nothing and that Defendant recover the costs of the action. Plaintiffs claim that this court's order that Defendant recover the costs of this action is in violation of their rights to due process because Defendant did not request recovery of its costs. Second, they complain that this court misconstrued their motion for disqualification of the undersigned as a motion brought pursuant to 28 U.S.C. Section 455(a) Rather than 28 U.S.C. Section 144.

Having read and considered Plaintiffs' motion and Defendant's response, the court finds Plaintiffs' motion for reconsideration to be without merit.

As to Plaintiffs' complaint with this court's award of recovery of coats "on its own initiative" absent such a request by Defendant, the court refers Plaintiffs to Fed.R.Civ.P.54(d)(1) ("Except when express provision thereto is made either in a statute of the United States or in these rules, costs other than attorney's fees shall be allowed as of course to the prevailing party unless the court otherwise directs ..."). Further, the court notes that Defendant has represented that it will not seek costs from Plaintiff. Plaintiffs' challenge to this court's judgment is accordingly moot.

Next, the court finds Plaintiffs' challenge to this court's application of 28 U.S.C. Section 455(a) to their motion for disqualification insufficient to warrant reconsideration of this court's order denying relief.

It is well settled that under either Section 144 or Section 455 an allegation of bias sufficient to require disqualification must demonstrate that the bias is personal as distinguished from judicial in nature. The alleged bias and prejudice, in order to be personal and disqualifying, "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."

Jaffe v. Grant, 793 F.2d 1182, 1188-89 (11th Cir. 1986) (*quoting United States v. Phillips*, 664 F.2d 971, 1002-03 (5th Cir. 1981); *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). *See also United States v. Meester*, 762 F.2d 867, 884 (11th Cir. 1985). This court found in its previous order that Plaintiffs' allegations of bias related to this court's previous rulings in the instant case and were supported with no factual

evidence of personal bias against them. Plaintiffs have offered no evidence to change the outcome of the ruling on their motion; they simply challenge this court's application of 28 U.S.C. Section 455(a) rather than 28 U.S.C. Section 144. The standard under either section for purposes of Plaintiffs' motion, however, is the same.

Further, the court finds that Plaintiffs were not prejudiced by this court's application of 28 U.S.C. Section 455(a) rather than 28 U.S.C. Section 144 to their motion for disqualification. The Eleventh Circuit has recognized that passing 28 U.S.C. Section 455, "Congress broadened the grounds and loosened the procedure for disqualification in federal courts." *United States v. Alabama*, 828 F.2d 1532, 1540 (11th Cir. 1987). Plaintiffs' claim was analyzed under an arguably less rigorous standard than that imposed by 28 U.S.C. Section 144. In sum, the court finds that the ruling on Plaintiffs' motion for disqualification would have been the same regardless of whether section 144 had been applied rather than section 455; because Plaintiffs have submitted no evidence of personal bias on the part of the undersigned, recusal is not warranted under either section.

For the foregoing reasons, Plaintiffs' motion for reconsideration [52-1] is DENIED.

SO ORDERED this 14th day of December 1999.

"s/ J. Owen Forrester" .
J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13569-CC

WILLIAM H. JOHNSON,
LINDA L. JOHNSON,
Plaintiffs-Appellants,

Versus

UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE,
Defendant-Appellees.

On Appeal from the United States District Court
For the Northern District of Georgia

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion_____, 11th Cir., 19__, ___F.2d___).

Before : TJOFLAT, EDMONDSON, and HULL,
Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
"s/ Gerald Brad Tjoflat" .

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
NO. 99-13569-CC

WILLIAM H. JOHNSON,
LINDA L. JOHNSON,

Plaintiffs-Appellants,

Verses

Filed
UNITED STATES OF AMERICA, Jul. 7, 2000
INTERNAL REVENUE SERVICE,

Defendants-Appellees.

On Appeal from the United States District Court
For the Northern District of Georgia

ORDER:

(✓ The motion of Appellants, William & Linda Johnson, for () stay () recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of Appellants, William & Linda Johnson, for (x) stay () recall and stay of the issuance of the mandate pending petition for writ of certiorari is granted to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of the order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of Appellants, William & Linda Johnson, for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of Appellants, William & Linda Johnson, for a further stay of the issuance of the mandate is DENIED.

"s/ Gerald Brad Tjoflat" .

UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13569
Non-Argument Calendar

District Court Docket No. 96-01757-CV-JOF-1

WILLIAM H.JOHNSON,
LINDA L. JOHNSON,

Plaintiffs-Appellants,

Versus

Filed
Apr. 24, 2000

UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Georgia

Before TJOFLAT, EDMONDSON and HULL,
Circuit Judges

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT the plaintiffs-appellants pay to the defendants-appellees, the costs on appeal to be taxed in accordance with Fed.R.App.P. 39.

Entered: April 24, 2000
For the Court: Thomas K. Kahn, Clerk
By: "s/ Matt Davidson" .
Deputy Clerk

ISSUED AS MANDATE: July 18, 2000

Appeals Transmittal and Case Memo
Date: Apr. 5, 1993
Routing To: [x] Exam. Supp. & Proc.
Copy To: [x] Examination
From: Appeals Code: 110
AP: A: PEH: pb Tel: (404) 331-0798
Special Features: [x] Offer in Compromise
Return To District

Taxpayer
JOHNSON, WILLIAM H. & LINDA L.

TIN	Work Unit No.
207-30-1327	10921225221

Tax Years
*8112, 8212 & 8312

Type of Case
[x] Income [x] OIC
Prior Findings: Tax Penalty
$64,338 $-0-
Disposal Information [x] Jurisdiction Rel.
Other Information

Conf.	Examiner
1	C. Butler

Remarks

APPEALS SETTLEMENT MEMORANDUM
ATTACHED

Date Apr 5, 1993

Appeals Officer		Earliest Statute Date
"s/ Patricia E. Hoyt"	3/24/93	12/4/93

Approved [x] Assoc. Chief
"s/ Ronald G. Miller" 3-25-93

TAXPAYER: William H. and Linda L. Johnson

TAX YEARS: 1981, 1982 and 1983

I. Issue

Whether the District Director's proposed rejection of the taxpayers' Offer in Compromise based on doubt as to liability should be sustained.

II. Proposal of Settlement

The taxpayers are not willing to make any concessions to resolve this case. It is my opinion that there are hazards to the government in litigating the issue of the tax liability and litigation is possible if the taxpayers pay the tax and file a claim for refund. However, the hazards can be cured by reissuing the statutory notices of deficiency. Therefore, I recommend that the case be returned to the Atlanta District Office for further development and consideration as to whether new notices will be issued.

III. Findings of Fact, Law and Argument

The taxpayers are seeking to compromise, under section 7122 of the Internal Revenue Code, their unpaid Federal income tax liabilities, plus statutory additions for the calendar years 1981, 1982 and 1983.

The amount of the offer is the total sum of $10.00 paid in full, with waiver of refunds, default agreement and other provisions on Form 656. The District Office rejection memorandum indicates that the amount of the outstanding liability totals $64,337.49.

The offer, based on the doubt as to liability, as filed by Mr. And Mrs. Johnson contends that they are not liable for the taxes, penalties and interest asserted against them because, as they contend, "the taxes were illegally assessed." The offer also states: "The Johnsons have been unable to find any evidence of Notice of Deficiency having been sent to the Johnsons as required by law ..." Notices of Deficiency were issued to the taxpayers on September 3, 1987 by the Philadelphia District, but the taxpayers never received the notices and argue that they were not issued to the last known address.

At the time that the Philadelphia District initiated action to secure delinquent tax returns from the taxpayers, they resided at 118 East Locust Street, Ephrata, Pennsylvania 17522. They had filed a joint protest-type tax return for 1981 with the Philadelphia Service Center which reflected the Locust Street address. The Service Center advised the taxpayers on June 22, 1982 that the return would not be accepted as a valid tax return. The statutory notice of deficiency letters were ultimately issued for 1981, 1982 and 1983 to the 118 East Locust Street, Ephrata, Pennsylvania address.

The taxpayers did not file tax returns in response to requests from the Philadelphia Examination Division. Financial records were not provided. The Revenue Agent, Carl Butler, issued a summons to the taxpayers' bank for records for the examination. The taxpayers unsuccessfully attempted to quash the summons. The Agent closed the examination of the 1981-1983 tax years on or around May 20, 1986. The examination of the taxpayers' 1984-1986 years was continued by the Agent after he closed the 1981-1983 years.

On July 15, 1986, (after the 1981-1983 years were closed from the group), the Agent received a letter from the taxpayer advising of a change of address to 345 Valleybrook Drive, Lancaster, Pennsylvania 17601. This was the only notice provided to the Service by the taxpayers as to a change of address.

During the course of the examination of the subsequent years, the Agent mailed letters to the taxpayers dated April 30, 1987 to the new Valleybrook Drive address. (Before the notices were mailed by the District Office.) The letters to the taxpayer and his wife were returned undelivered.

During the examination, the Agent made numerous queriers to the Post Office for information concerning the taxpayer's new address. The taxpayers maintained Post Office boxes in their name and also in various business names used by Mr. Johnson. The boxes were changed a number of times.

On May 13, 1986, just prior to the 1981-1983 years being closed from the group, the Agent received information from the Post Office that the taxpayers' new address was P.O. Box 7868, Lancaster, Pennsylvania, 17605-7868. On May 18, 1987, (after the 1981-1983 years were closed from the group but before the notices were issued) the Post Office advised the Agent in the field who was still working subsequent years that the taxpayers' address had changed to P.O. Box 8353, Lancaster, Pennsylvania, 17604. It appears that this Post Office box was probably the only address in use at the time that the notices were mailed. In the Appeals conference, the taxpayers indicated that at the time the notices were mailed, they had left Pennsylvania and were staying with friends in Florida. They did not return to reside in

Pennsylvania, but later moved to Georgia.

The Philadelphia Collection Division apparently worked a case on the taxpayers. The case file has copies of requests for addresses to the Lancaster, Pennsylvania Post Office by Revenue Officer Dennis White. After a letter to P.O. Box 7868 was returned undelivered to Revenue Officer White on May 20, 1988, (after the notices were issued), the Post Office advised White that P.O. Box 7868 had been closed by the taxpayers on March 30, 1987 with the mail to be forwarded to the new address, P.O. Box 8353, Lancaster, Pennsylvania. Box 8353 was closed on November 2, 1987 (after the notices were issued) with no forwarding address provided. According to the Post Office, both of these boxes were "also rented under name of I.C.R. Corp."

The above information provided to the Revenue Agent (before the notices were issued) and the Revenue Officer (after the notices were issued) relating to the taxpayers' Post Office box numbers is consistent. The taxpayers point to this evidence in arguing that the Service did not issue the notices to the last known address. In the Appeals conference, the taxpayers actually argued alternatively that their mailing address at the time the notices were issued was the 345 Valleybrook address. When I pointed out that the Service had received mail returned undelivered to this address before the notices were issued, the taxpayers simply argued that the Service was in error because the notices were only mailed to an old address which the Service knew was no longer the correct address.

The taxpayers have filed numerous FOIA requests with the Philadelphia and Atlanta Districts as well as appealing to the Problems Resolutions Office in each

District. Many of the documents in the case file were provided to the taxpayers in response to various requests. The taxpayers have received information from the 1981-1983 case files as well as from the examination files for the 1984-1986 years. It is not possible now to determine the origin of much of the information in the current case file. (Note that page numbers are not consecutive, etc.)

The hazards in this case arise from the fact that the Service had knowledge of a more recent Post Office box number for the taxpayers at the time the notices were issued. This information was secured by the Agent in the field from the Post Office, not from the taxpayers. The information was not forwarded to the District Office for use at the time the notices were mailed. In fact, once the Agent closed the case from the field, he would have had no knowledge of the status of the years previously closed.

In this case, it is interesting to note that the taxpayers retained a certified public accountant who prepared returns for 1981-1983. The returns were submitted to the taxpayers on October 30, 1984 with a letter from the CPA advising the taxpayers to mail the returns to the IRS and that they owed a balance due of $2,636 for 1981. A refund purportedly was due for 1982 and 1983. Rather than filing the returns, the taxpayers advised the Revenue Agent by letter that they had determined that they did not owe any Federal income tax for 1981-1983 and that they had a right to a full refund of all income tax withheld.

In the Appeals conference, I asked the taxpayers why they did not file the returns prepared by their CPA. They indicated that they did not file because of the way the Revenue Agent had treated their CPA and

Attorney. It does not appear that the taxpayers ever met with the Revenue Agent. Correspondence in the case file clearly indicates that the taxpayers' CPA and attorney both were encouraging the taxpayers to voluntarily file their tax returns. However, this was not done.

Internal Revenue Code section 6212 provides that a notice of deficiency "shall be sufficient" if mailed to the taxpayer at his last known address. Section 6212 does not require that the taxpayer actually receive the notice of deficiency. *Keado v, Commissioner,* 88-2 USTC 9489 (5th Cir. 1988). The taxpayer's last known address is the address appearing on the taxpayer's most recently filed return, unless the IRS is given clear and concise notification of a different address. *Barbara Abeles v. Commissioner,* 91 TC 1019 (1988). If the government is notified of a change of address, then reasonable care and diligence must be exercised in ascertaining and mailing the notice of deficiency to the correct address. *Keeton v. Commissioner,* 74 TC 377 (1980).

In the instant case, the notices of deficiency were issued to the address appearing on the 1981 protest tax return that was mailed to the Service but not accepted as a return. Even when the notices were returned undelivered, the second notices were mailed to the same address. I confirmed with the Philadelphia 90-day letter unit that no notices were issued to other addresses. There is no evidence that any research was conducted to determine a more current address. The taxpayers had notified the Service of a new address before the notices were issued, but there is evidence that mail sent by the Service to the new address was returned undelivered before the notices were issued. The problem was compounded by the fact that

information on other addresses was secured by Service personnel in the field whereas the notices were issued by the District headquarters office who was not in contact with Revenue Agent or Revenue Officer.

I requested advice from District Counsel regarding the sufficiency of the deficiency notices previously mailed to the taxpayers. They concluded that the notices were of questionable validity and "therefore, it would be best not to rely on the original statutory notices of deficiency," They also agree with me that new deficiency notices can be mailed to the taxpayers. (See copy of District Counsel's response in case file.)

After the case was assigned to the Appeals Office, it was discovered that the taxpayers subsequently did file tax returns for 1981-1983. I requested the 1981-1983 returns in order to secure the Philadelphia District examination files for those years. In response to my request, I received various documents, but have not received the examination files. However, the files that I received included original joint Federal income tax returns submitted by Mr. and Mrs. Johnson to the Atlanta District Office (Group 4700) on December 4, 1990. This was the first indication that I had that such returns had been filed. Of course, they were submitted by the taxpayers after the separate statutory notice letters had been issued and defaulted for 1981-1983. The tax returns were treated as claims. The Atlanta Service Center issued certified notices of claim disallowance letters on June 3, 1991 for 1982 and 1983 and on June 5, 1991 for the 1981 tax year.

If the returns rejected by the Atlanta Service Center are considered filed by the taxpayers, then the three-year statute of limitations would be open until December 4, 1993. (Three years from the date received

by the Service.)

A protest tax return filed by a taxpayer is not considered a tax return and the statute of limitations does not start running. *W. H. Edwards*, 82-2 USTC 9472 (CA-9, 1982). Therefore, no statute started running on the 1981 year as a result of the filing of the protest tax return. If no return is filed, then no statute ever starts running. *Wallace Kraus v. U.S.*, 85-1 USTC 9310 (D.C., East Dist. N.Y., 1985). The IRS can issue multiple notices as long as the taxpayer has not petitioned the Tax Court and the statute is still open. *Lewis E. Smoot v. Commissioner*, 25 BTA 1038 (1932).

Atlanta District Counsel agrees with me that there is nothing in the instant case to prevent the issuance of deficiency notices at the present time. They conclude that "a second deficiency notice can be issued covering the same taxable periods due to the fact that no petition has been filed with the Tax Court and the statute of limitations has not lapsed." The only problem that I see is that the Philadelphia District examination files cannot be located.

The taxpayer filed a Form-911 and initiated a PRO case in Atlanta. The PRO case was worked by Atlanta Revenue Agent Brian Word. The case apparently was worked as an informal claim for refund. No abatement was recommended and the examination was concluded in January, 1992. Mr. Word recalls that he had the Philadelphia District examination workpapers when he worked the informal claim PRO case. His files, including the examination workpapers, were closed to the Atlanta Exam Division Problems Resolution Section. The subject Offer in Compromise was rejected by the Atlanta Examination Division

based strictly on the examination conducted by Agent Word. PRO secured the files that I have received; however, they DO NOT include the exam workpapers. Silas James has personally worked to secure the Philadelphia examination workpapers, but to no avail.

IV. Conclusion

The taxpayers' Offer in Compromise is based on doubt as to liability because the validity of the deficiency notices may be questionable. Since the Service can still issue deficiency notices on the same years, I cannot accept or reject the taxpayers' offer at this time. Therefore, I recommend that this case be returned to the Atlanta District Examination Division for reissuance of the notices if the notices if the exam workpapers can be found. If they cannot be found, then I suggest that the Examination Division's proposed rejection of the taxpayers' Offer in Compromise be reconsidered. Without the workpapers, there is no evidence with which to go forward in court to establish the basis of the figures used in the deficiency notices for the taxpayers' income. It is my opinion that the Appeals Office could not sustain the proposed rejection without the workpapers. In any event the taxpayer's correct tax figures would not be less than the amounts of tax shown on the "returns" filed by the taxpayers on December 4, 1990.

For the reasons explained above, it is also my opinion that any new deficiency notices should be issued before December 4, 1993. Therefore, that statute date should be controlled for examination purposes rather than the later collection statute date.

Investigation History:

Hand written notes of Revenue Officer Janet Grimes

Dated: 3-23-93, Rec'd TC from Patricia Hoyt, stated have status of OIC, she is returning case to Examination Division to be reworked. Tax amount is incorrect, in addition to examination issuance of Statutory Notice to wrong address when had a correct address for Tp, Tp never received notice. Case work papers have not been located to date, therefore tax will need adjusting by Examination Division. She recommend do not pursue collection at this point since tax assessment is not correct, she will send copy of settlement papers outlining her decision by 3-25-93

Reviewers Report Control no. 207-30-1327
To: (Group Manager) Referred to:
Darryl Gilliam B. Word 06-23-93
Number of returns: (3)
TYPE OF REPORT: [X] Other
Statute expires in six months: 12-04-93
Name of Taxpayer: Reason for review:
William H. & Linda L. [x] Mandatory
Johnson Offer in Compromise

Comments
(use Form 885-A Snap-out for continuation sheet is necessary)

This case was returned to the Atlanta District by the Appeals Office for further consideration of the offer in compromise. The offer in compromise is predicated on doubt as to liability alleging deficiency notices for the years in question (1981, 1982 and 1983) were not mailed to taxpayers' last known address. Appeals and District Counsel both concluded, that the deficiency

notices previously issued to the taxpayers are of questionable validity. Therefore, they agree that it would be best not to rely on the original notices. However, they have suggested that the Atlanta District reissue the deficiency notices, if the examination workpapers can be located.

This case involves deficiency notices that were issued in another district, numerous FOIA requests, a PRO case and an offer in compromise as well as District Counsel and Appeals involvement. Nevertheless, due to the involvement of so many different departments within the Internal Revenue Service, this case has turned into an administrative nightmare. At present, the missing original workpapers have put the Service in a precarious position, and the taxpayers are unwilling to make any concessions to resolve the case. Therefore, certain steps must be taken to protect the government's interest and bring this case to a close.

First, efforts should be made to locate the missing workpapers, contact should be made with those persons who were involved with this case. These contacts should include but not be limited to Appeals Officer P. Hoyt.

Since, the workpapers were available at the time the case was worked as a PRO case, the Form 3210 that released the workpapers from that group should be reviewed, along with any subsequent Forms 3210. The trail of these forms may lead you to the present location of the workpapers. If the workpapers can be located the District may proceed with the reissuance of the deficiency notices.

Reviewer	Date	Approved (Chief Quality Review)
M.B.Jones /s/MBJ	6/28/93	/s/Betty Dawson

Examiner	Additional	Date
/s/Brian A. Word	28	9-21-93
Group Manager		Date
/s/Daryl Gilliam		9/27/93

EXPLANATION OF ITEMS

Name of Taxpayer	Year/Period Ended 8112
William H. & Linda L. Johnson	8212, and 8312

However, if the workpapers cannot be located it may be necessary to abate those assessments that were based on the deficiency notices issued by the Philadelphia District. If abatement procedures are executed, I suggest that the returns filed by the taxpayers on December 4, 1990, be processed as delinquent returns. However, the returns should be compared with the write-up for the years in question and inquiry should be made regarding any differences. The returns as filed by the taxpayers reflect an amount due for the 1981 year and refunds for the 1982 and 1983 years. However, due to the statute of limitations the taxpayers are not entitled to receive any refunds for these years. It is important to note that if the returns rejected by the Atlanta Service Center are considered to be filed returns, the statute of limitations will expire on December 4, 1993. Therefore, it is in the best interest of the Service to take all necessary action and properly document the file before December 4, 1993, as to avoid yet another questionable issue.

Please forward the case to Quality Measurement Staff attention M.Jones upon closure.

RESPONSE TO REVIEWER'S REPORT

Per discussion with GM on how best to proceed with this case, it was decided that RA would meet with TP in order to examine TP informal claim whereby TP would provide records to verify informal claims. The workpapers in the file document the results of the meeting with the TP as well as subsequent discussions with GM and QMS.

In summary, TP refused to cooperate in providing records and provided a signed statement that they wish to decline any reconsideration of their tax liabilities for 1981, 1982 and 1983.

Because TP had previously filed returns for 1981, 1982 and 1983 with IRS thru Collection Division, the claims are being processed as follows:

TP will be given joint status by abating assessments on Mrs. TP account for all three years as they were treated as MFS.

Since the TP has refused to provide verification for returns (claims), income is being accepted as stated and expenses are being reduced to reflect nominal amounts. No capital losses are being allowed.

This casefile is being resolved based on the above.
L693 is completed and is attached to be sent to the TP pending your receipt and review of the casefile.

/s/ Brian A. Word
Brian A. Word
Revenue Agent, Group 1327
488-9455

ADDENDUM TO 4318

Upon having meeting with the TP, RA determined the informal claim would be disallowed in full. RA called Monica Jones in QMS and advised of the results of the meeting. It was determined that due to the fact that the records, which supported the original assessment, were unlocatable it would be in the best interests of the government to allow the TP informal claim anyway because without the records, Appeals would not support the assessments, nor would District Counsel support the assessments. It was felt that the TP, due to the history of the case, would pursue the matter to the highest level possible, which includes court litigation. Since we cannot locate the records then it is best to concede the prior assessments.

It was decided to allow, on Schedule C, 15% of gross receipts as ordinary and necessary business expenses and not the amount TP claimed since the TP refused to cooperate. All other issues such as basis on assets sold, etc. were conceded since we have no way of proving otherwise.

Handwritten Note:
(Handwriting appears to that of Monica B. Jones)

William & Linda Johnson 11/3/93

Re: Search for original records

Form 2275 submitted through PRO 11/2/93

R/A Word did no further search for records upon receipt of the case file via 3990. He was advised by his G.M. that this would be pointless and that he should

pursue working the informal claim.

Appeals Transmittal dated 4/5/93 from P. Hoyt p.6. Hoyt mentions that Silas James of the Exam PRO Office worked personally to secure the Exam workpapers but to no avail.

INTERNAL REVENUE SERVICE

MEMORANDUM

DATE: November 17, 1993

TO: Betty Dawson, Section Chief, QMS
Atlanta District

From: Monica B. Jones, Reviewer, QMS
Atlanta District /s/ MB Jones

SUBJECT: William and Linda Johnson –
SSN: 207-30-1327

Pursuant to our conversation on November 2, 1993, regarding the Offer in Compromise case of William and Linda Johnson I executed Forms 2275 (Records Request) for all years in question (8112, 8212, and 8312) via Examination Division's Problem and Resolution Office. The search for the records resulted in the finding of the attached workpapers, but no records. The researcher noted on the Forms 2275 that the records were charged out to Silas James. I have followed-up with Mr. James and these records are no

longer in his possession.

At present, a decision must be made as to what should be the final disposition of this case. This decision should preferably be made before December 4, 1993, as this is a questionable statute date. Copies of the Appeals Transmittal, District Counsel Opinion, Form 3990, and the R/A's response to 3990 are attached for your review.

Please inform me of your concurrence with the proposed closure of this case or advise me of other procedures that should be executed to bring this case to a final conclusion.

(Handwritten notes at bottom of page)

Manager held a meeting on 11/23/93 with Monica & Nancy R. (Stat Notice Coord). We discussed possible approaches to dispose of the case. After considering the Pro's & con's of each approach, manager advised the reviewer (Monica) to issue a 2nd Notice of Deficiency (with figures different from the original notice). It will take into consideration findings/outcome of RA, B. Word's meeting with the TP and audit recommendations. It will also be consistent with lack of substantiation cases in preparation of the Stat Notice. We must ensure that the notice is sent to the correct address. Submit no later than 11/30/93. This approach is consistent with Counsel's advice.

/s/ Betty Dawson

Sec Chief, QMS

Internal Revenue Service
Department of the Treasury
401 W. Peachtree Street, N.W., Atlanta, GA 30365
District
Director

Person to Contact:
J. Stubbs
Telephone No.:
(404) 331-6033
Refer Reply to:
F 58200770
Date:
May 6, 1992

Mr. William H. & Linda L. Johnson
5158-T East Ponce de Leon Avenue
Stone Mountain, Georgia 30083

Dear Mr. & Mrs. Johnson:

Thank you for allowing us additional time in which to respond to your Freedom of Information Act (FOIA) request.

Enclosed are copies of the 1981, 1982 and 1983 tax returns for William, SSN: 207-30-1327. Nothing has been excised or withheld.

At the present time, we have been unable to locate any separate returns for Linda, SSN: 185-34-1998. If you have any additional information which would assist us in locating other returns , please let us know.

If you have any questions or I can be of further assistance, please let me know.

Sincerely Yours
/s/ Jean S. Pate
Jean S. Pate, Disclosure Officer Enclosures: As stated

(Handwritten notes of William H. Johnson
at bottom of previous page)

Received May 9, 1992

May 11, 1992 8:24 AM, Phoned and talked with J. Stubbs about Exam Files which have not been received by us. I made her aware that I had seen additional files at Jan. 28, 1992 meeting with Brian Word.

She told me that we would receive examination files only by mistake !?

IPR Substitute for Returns (SFR) Program
IR Manual 3(15)(185)0

3(15)(185)(12)
Statutory Notices

3(15)(185)(12).1
Notice Issuance Criteria

(1) Statutory Notice of Deficiency procedures will be employed when:

(a) a response to Letter 1862(C) is not received within 45(60) days (75 days for APO/FOP addresses and those addresses outside the U.S.);

(b) an undelivered response that cannot be reissued to a new address after using procedures in 3(15)(185)(10).2;

(c) a remailed (undelivered that obtains a new address) Letter 1862(C) package which is not responded to

within 45(60) days (75 days for APO/FOP addresses and those addresses outside the U.S.);

(d) a remailed (undelivered) Letter 1862 (C) package is returned as being undeliverable to a new address and all addresses found have been tried;

(e) other correspondence issued in an attempt to resolve missing data, etc., according to instructions in 3(15)(185)(10) is not responded to within 45 days (60 days for APO/FOP addresses and those outside the U.S.).

(2) Statutory Notices of Deficiency will only be issued when the

(complete line redacted from text)

according to instructions above.

3(15)(185)(13).4
Undelivered Statutory Notices

(1) When a Statutory Notice of Deficiency is returned by the Post Office as undeliverable, first check IDRS to see if a change of address has occurred due to the posting of a subsequent year's tax return or other activity.

(2) If a new address is found, prepare a new Statutory Notice of Deficiency, using the new address following the instructions in 3(15)(185)(12).2 and 3(15)(185)(12).3 above.

(a) When re-mailing a statutory notice to a new address , the address used must be noted in the case file.

(b) Place the original undelivered statutory notice in the case file.

(3) If a new address is found by (1) above, check the case file to see if any other address (which has not been used already) exists. Follow undeliverable

instructions in 3(15)(185)(10).2 above whenever possible (i.e., the letter 1862(C) was not responded to nor returned undeliverable).

(a) If a new address is found, prepare a new statutory notice. Follow 3(15((185)(12).2 and 3(15)(185)(12).3 instructions.

(b) If a new address is not found, the assessment will be made after the Statutory Notice of Deficiency suspense period has expired.

(4) Whenever a new notice is issued, make sure to update the IDRS control base, Also note the case file.

Internal Revenue Service
Department of the Treasury
401 W. Peachtree Street, N.W., Atlanta GA, 30365
District
Director

Person to Contact:
M. McGovern
Telephone No:
(404) 331-6033
Refer Reply to:
F-0636
Date:
January 21, 1998

Mr. and Mrs. William H. Johnson
5158 East Ponce de Leon Ave.
Apt. T
Stone Mountain, GA 30083

Dear Mr. and Mrs. Johnson:

This is in response to your letter dated January 17, 1998, in which you requested data under the provisions of the Freedom of Information Act (FOIA).

With your letter you enclosed a transcript of your 1981 tax account which was printed on January 10, 1996. You asked us to provide you with information concerning an entry identified as **PROJ:021 PTR-DO:00.**

Based on our research please find enclosed an excerpt from Document 6209, ADP and IDRS INFORMATION, 1994-declassified. Project 021 is a PUSH CODE which indicates a SUBSTITUTE FOR RETURN CASE. The remaining portion does not apply to you ... it applies only to partners and partnerships.

As you know, we are not required to perform research under the provisions of the FOIA. You can, however, request a copy of Document 6209 under the act. It is available to you for $64.95. If you are interested, please send us your written request along with your check or money order made payable to the Internal Revenue Service.

Please let us know if we can offer further assistance.

Sincerely yours,
/s/ Jean S. Pate
Jean S. Pate
Disclosure Officer

Enclosure:
As stated

DISCUSSION

The United States will address each of the requests as plaintiffs have presented them in their Motion to Compel, and will set out plaintiffs' request and the Government's response.

REQUEST DATED JANUARY 20, 1999:

Request: All documents and material relevant to Internal Revenue Service project 21 which is identified on attached copy of computer printout, marked for identification (M-1).

Response: The United States objects to this request to the extent the request seeks documents with respect to taxpayers other than the plaintiffs. The United States will produce the requested documents, other than documents to which the objection applies, at a time and place to be determined by mutual agreement between the parties.

Discussion: Plaintiffs allege in their Motion to Compel that "On April 14, 1998, Defendant's Counsel, Ann Reid, informed Plaintiffs that the United States will not produce relevant documents to this request." Actually, the undersigned counsel informed plaintiff William Johnson that no such documents exist. There are no documents to be produced.

REQUEST DATED MARCH 4, 1998:

Request 1. Copy of joint appointment letter referenced in "History" dated 5-7-86, circled and highlighted for identification, document marked for identification, K-238, attachment 1-2.

Response: The United States objects to this request on the ground that the documents requested are not relevant to this case nor are they reasonably calculated to lead to admissible evidence.

Discussion: Plaintiff is requesting a copy of a document from a revenue agent in

PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.